

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**JAMIE L HOEFLING
602 N 11TH
CHEROKEE IA 51012**

**TYSON RETAIL DELI MEATS INC
C/O TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 05A-UI-04672-RT
OC: 04-25-04 R: 01
Claimant: Respondent (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Tyson Retail Deli Meats, Inc., filed a timely appeal from an unemployment insurance decision dated April 20, 2005, reference 02, allowing unemployment insurance benefits to the claimant, Jamie L. Hoefling. After due notice was issued, a telephone hearing was held on May 23, 2005, with the claimant participating. The employer did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. The administrative law judge notes that the employer is represented by TALX UCM Services, Inc., which is well aware of the need to call in a telephone number in advance of the hearing if the employer wants to participate in the hearing. The administrative

law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full time laborer from July 10, 2001 until she was discharged on April 6, 2005 for poor attendance. The claimant was absent on March 31, 2005 because her son was sick. The claimant's son is two years old and has a kidney infection and is often ill. The claimant properly and timely reported this absence. The employer has a policy that an employee must notify the employer before the start of the employee's shift if that employee is going to be absent or tardy. The claimant properly did so for this absence. On March 31, 2005, the claimant was absent again because her son was ill. She properly and timely reported this absence. On March 7, 2005, the claimant was absent for personal illness and she properly and timely reported this absence. On March 1, 2005, the claimant was again absent because of an illness of her son. She properly and timely reported this absence. On December 3, 2004, the claimant was tardy two hours because she had a doctor's appointment. She properly and timely reported this tardy. The claimant received three written warnings called attendance notifications as follows: November 10, 2004; December 3, 2004; and March 9, 2005. Pursuant to her claim for unemployment insurance benefits filed effective April 24, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,404.00 as follows: \$351.00 per week for four weeks from benefit week ending April 30, 2005 to benefit week ending May 21, 2005. Of that amount, \$356.00 was offset against an overpayment. In a prior benefit year effective April 25, 2004, and following her separation from the employer herein on or about April 6, 2005, the claimant received \$806.00 as follows: \$160.00 for benefit week ending April 9, 2005 (earnings \$243.00); \$323.00 per week for two weeks benefit weeks ending April 16, 2005 and April 23, 2005. Total benefits received by claimant following her separation from the employer is \$2,210.00 reduced by the \$356.00 which the claimant was overpaid and of which was offset. Total benefits received by the claimant are therefore \$1,854.00.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
 - a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The claimant credibly testified and the administrative law judge concludes that she was discharged on April 6, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies but necessarily requires the consideration of past acts and warnings. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including excessive unexcused absenteeism. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, including, excessive unexcused absenteeism. Specifically, the employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The employer also did not provide sufficient evidence of absences or tardies on the part of the claimant establishing excessive unexcused absenteeism and disqualifying misconduct. The claimant credibly testified that she had four absences in the last four months of her employment as set out in the findings of fact. Three were for illness of her son and one for personal illness. The claimant's son is two years old and has a kidney infection and is often

ill. The claimant properly reported all of these absences. The claimant was also tardy on December 3, 2004, two hours for a doctor's appointment and again this was properly reported by the claimant. Under the evidence here, the administrative law judge is constrained to conclude that the claimant's absences and tardy were for reasonable cause or personal illness and were properly reported and are not excessive unexcused absenteeism. It is true that the claimant received three written warnings called attendance notifications but as noted above the claimant's absences and tardies are not excessive unexcused absenteeism. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, she is not disqualified to received unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,854.00 since separating from the employer herein on or about April 6, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision dated April 20, 2005, reference 02, is affirmed. The claimant, Jamie L. Hoefling, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

sc/sc