

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

MARSHA M COMSTOCK
105½ N BROAD
SHENANDOAH IA 51601

EXCEL CORPORATION
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-10333-RT
OC: 08-15-04 R: 01
Claimant: Respondent (2)

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, Excel Corporation, filed a timely appeal from an unemployment insurance decision dated September 8, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Marsha M. Comstock. After due notice was issued, a telephone hearing was held on November 4, 2004 with the claimant participating. Lidia Borer, training supervisor, participated in the hearing for the employer. Employer's Exhibits 1 and 2 were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

The administrative law judge received a letter from the employer dated September 30, 2004 requesting a postponement because the employer's witness would be on vacation. The administrative law judge attempted to call the claimant at 1:31 p.m. on October 1, 2004 at the number the claimant provided which was the telephone number for the Iowa Workforce Development local office in Shenandoah, Iowa. The claimant, of course, was not there but the administrative law judge spoke to Betty who indicated that she would try to reach the claimant and inform her that the hearing had been rescheduled. The administrative law judge tried to call the claimant at her telephone number in Iowa Workforce Development records and discovered that the number was disconnected. The administrative law judge then called the employer's representative at 1:37 p.m. on October 1, 2004 and left a message for the representative to call the administrative law judge. It appeared to the administrative law judge that there might be some difficulty in getting a message to the claimant that the hearing was going to be rescheduled. The employer's representative called the administrative law judge at 1:42 p.m. and indicated that the employer's witness was not going to be on vacation but would be in union negotiations for several weeks. The administrative law judge concluded not to grant the rescheduling or continuance and to go with the hearing as scheduled on October 14, 2004 at 10:00 a.m., especially in view of the difficulties in reaching the claimant. The administrative law judge then called the Shenandoah local Workforce Development office back at 1:48 p.m. and spoke to Joel and the administrative law judge informed him that the hearing was not going to be rescheduled and not to tell Ms. Comstock that the hearing would be rescheduled. At the time for the initially scheduled hearing at 10:00 a.m. on October 14, 2004, the employer had not called in a telephone number where any witnesses could be reached for the hearing. The administrative law judge attempted to call the claimant at the Workforce Development office telephone number in Shenandoah, Iowa, which had been previously provided by the claimant. The claimant was not there. The administrative law judge again spoke to Joel who informed the administrative law judge that the claimant was not there. Joel also informed the administrative law judge that he had been unable to reach the claimant so the claimant was not aware that there had been an initial rescheduling of the hearing and the claimant should have been present for the hearing. However, the claimant had informed the local Workforce Development office that she was not able to attend the hearing at that time and wanted it rescheduled. The claimant was told to call the Appeals Section but the claimant never did so. Because of the difficulties in having a hearing, the administrative law judge decided to reschedule the hearing. He so informed Joel who said he would attempt to call the claimant and the administrative law judge also informed the representative of the employer. The hearing was rescheduled for November 4, 2004. The employer called in the name of a witness, Lidia Borer, training supervisor, and the administrative law judge reached Ms. Borer without difficulty at 3:00 p.m. The administrative law judge then called the Iowa Workforce Development office in Shenandoah and the claimant was not there. He again talked to Joel. Joel said that he would try to call the claimant at her home number but again learned that it had been disconnected. Joel then said he was going to go to the claimant's residence. The administrative law judge explained to Joel that he was going to have to start the hearing and did so when the record was opened at 3:09 p.m. At 3:20 p.m., the claimant, after being reminded of the hearing by Joel, called from a neighbor's home providing another telephone number which the administrative law judge called at 3:21 p.m. and the claimant participated in the balance of the hearing. The claimant had received both notices for hearings and knew the hearings were to be scheduled on both of the days and times in question but apparently had chosen not to make arrangements to be available. In any event, the claimant participated in the balance of the hearing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits 1 and 2, the administrative law judge finds: The claimant was employed by the employer as a full-time general laborer from September 2, 2003 until she was discharged on August 13, 2004 for poor attendance. The claimant had 18 absences or tardies or occasions when she left work early in the last four months of her employment from and after April 20, 2004 as shown in Employer's Exhibit 1. Of those absences as shown at Employer's Exhibit 1, 9 absences were for personal business although they were properly reported to the employer. On one occasion, the claimant had to take her son to the doctor, on another occasion her car was not running, and on another occasion she had to take her fiancé to the dentist. Finally, the claimant had 3 or 4 such absences or more because she had to go to court for bad checks. The claimant also had an absence on May 20, 2004 for which she gave no reason but for which she did properly report. This absence was for a vacation that the claimant had requested in advance and was told it was acceptable but the claimant did not turn in her vacation form in time. The claimant also had an absence on June 3, 2004 for no reason given although she properly reported that absence. The claimant was also absent on June 8, 2004 without notifying the employer although she had been released by her physician to go to work. The claimant also had absences for illness which were properly reported on June 7, 2004, June 14, 2004, and June 15, 2004. The claimant left work early on July 16, 2004 but she had permission to do so. The claimant was tardy on July 23, 2004 but could not remember why. The claimant was absent on August 10, 2004 because her car broke down and she called this absence in late.

The claimant received three written warnings for her attendance on January 19, 2004; February 6, 2004; and June 23, 2004 which was the claimant's last warning. The claimant was informed at that time that any more days missed would result in her termination if not excused. This warning was in lieu of a suspension or termination. Pursuant to her claim for unemployment insurance benefits filed effective August 15, 2004, the claimant has received unemployment insurance benefits in the amount of \$3,091.00 as follows: \$281.00 per week for 11 weeks from benefit week ending August 21, 2004 to benefit week ending October 30, 2004. Of that amount, \$78.00 from benefit week ending August 21, 2004 was offset against an overpayment from 2001.

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.
2. Whether the claimant is overpaid unemployment insurance benefits. She is.

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, (7) provide:

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).

(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 parties testified, and the administrative law judge concludes, that the claimant was discharged on August 13, 2004. 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 and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 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 met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely excessive unexcused absenteeism. The claimant's absences are set out in the findings of fact and at Employer's Exhibit 1. The claimant had 18 absences, tardies, or occasions when she left work early, in the last four months of her employment. The administrative law judge believes that, in general, these are excessive.

Looking more closely at the absences, nine absences were for personal business. They were all properly reported to the employer. At first, the claimant could not recall the reasons for any

of these absences but finally testified that on one occasion she took her son to the doctor and on another occasion her car was not running and on the third occasion she had to take her fiancé to the dentist. The administrative law judge does not believe that the absence to take her fiancé to the dentist is justified and concludes that it was not for reasonable cause or personal illness. The claimant testified that she had three or four absences to go to court because of bad checks. The administrative law judge concludes that these absences were not for reasonable cause or for personal illness. The claimant also had two other absences for personal business not accounted for. The administrative law judge concludes that these two absences were not for reasonable cause. The claimant also had an absence on June 3, 2004 which was properly reported but for which she gave no reason. The administrative law judge concludes that this absence was not for reasonable cause or personal illness. The claimant testified that some of these absences for personal business or no reason given were for personal illness. However, the administrative law judge does not believe that this is credible because the claimant did properly call in other absences when she was sick so the administrative law judge must assume that when the claimant was sick, she reported her absence as illness and when she was not sick, she reported either as personal business or no reason given. The claimant also had an absence on June 8, 2004 when she was a no-call/no-show which was not properly reported even though she was at that time released to return to work by her physician. Finally, the claimant had an absence on August 10, 2004 because her car broke down and the claimant called this absence in late. The administrative law judge understands an occasional absence or tardy for transportation and believes that the two absence for car transportation, one for personal business noted above and the one on August 10, 2004, were for reasonable cause and properly reported or the claimant was justified in not properly reporting it. The claimant also had a tardy on July 23, 2004 which she believed was arranged in advance but there was no other evidence of that. Even taking the claimant's testimony in the light most favorable to the claimant as the administrative law judge has done above, the claimant still has nine absences that are not for personal illness or reasonable cause.

The claimant received two written warnings for her attendance as shown at Employer's Exhibit 2. The first was January 19, 2004 and the second was on February 6, 2004. The third and final one was on June 23, 2004 and the claimant was informed at that time that it was her last warning and any more days missed would result in her termination if not excused. Thereafter, the claimant had two absences for personal business, one absence when she left work early, one tardy and one absence as a no-call/no-show or a call in late when her car broke down. The claimant was then discharged. Under the evidence here, the administrative law judge is constrained to conclude that claimant's absences were excessive unexcused absenteeism and disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

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 \$3,091.00 since separating from her employer on or about August 13, 2004 and filing for such benefits effective August 15, 2004, to which she is not entitled and for which she is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of September 8, 2004, reference 01, is reversed. The claimant, Marsha M. Comstock, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct, namely excessive unexcused absenteeism. The claimant is overpaid unemployment insurance benefits in the amount of \$3,091.00.

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