

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**TODD A TORRES**  
Claimant

**APPEAL NO: 06A-UI-09164-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ADVANCED BUILDING**  
Employer

**OC: 08/13/06 R: 01  
Claimant: Respondent (2)**

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

**STATEMENT OF THE CASE:**

Advanced Building (employer) appealed a representative's September 6, 2006 decision (reference 01) that concluded Todd Torres (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 27, 2006. The claimant did not provide a telephone number where he could be reached and, therefore, did not participate. The employer participated by Larry Peterson, Vice President.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct and is not eligible to receive unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on January 21, 2006, as a full-time framing carpenter. The employer gave the claimant at least two warnings for tardiness. The employer gave the claimant an additional warning for failure to properly report his absence when he was incarcerated.

On August 1, 2006, the employer met with employees about an upcoming job out of town in Storm Lake, Iowa. The employer warned the employees that their conduct on the job and off the job while in Storm Lake, Iowa, must be acceptable because it is a reflection of the employer's work. The employer was stationed in Storm Lake, Iowa, from August 7 through 11, 2006.

The claimant did not return to the motel room until late August 9 or early August 10, 2006. The claimant stayed out late and was groggy at work on August 10, 2006. The claimant did not return to the motel until 3:00 a.m. on August 11, 2006. He was supposed to be in the parking lot and ready for work at 7:00 a.m. The claimant's roommate saw the claimant passed out in feces

on his motel bed. The roommate could not wake the claimant. Later the claimant woke up and put his soiled sheets in the motel's washer without any soap. The sheets were ruined. The employer terminated the claimant on August 14, 2006.

### **REASONING AND CONCLUSIONS OF LAW:**

The administrative law judge finds the claimant was discharged for misconduct and is not eligible to receive unemployment insurance benefits.

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).

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Three incidents of tardiness or absenteeism after a warning constitutes misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. Higgins v. Iowa Department of Job Service, 275 N.W.2d 187 (Iowa 1984). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employer has a right to expect employees to conduct themselves in a certain manner. The

claimant disregarded the employer's right by repeatedly failing to follow instructions by reporting to work tardy and destroying motel property. The claimant's disregard of the employer's interests is misconduct. As such he is not eligible to receive unemployment insurance 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 claimant has received benefits in the amount of \$411.00 since filing his claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

**DECISION:**

The representative's September 6, 2006 decision (reference 01) is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$411.00.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

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