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

Appeal Number: 06O-UI-02505-DT
OC: 10/23/05 R: 02
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.

JAMES E LAFON
2718 GLOVER AVE
DES MOINES IA 50315

CHARLES GABUS FORD INC
4545 MERLE HAY RD
DES MOINES IA 50310

____
(Administrative Law Judge)

____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Charles Gabus Ford, Inc. (employer) appealed a representative's November 14, 2005 decision (reference 01) that concluded James E. La Fon (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. There had been a prior hearing and decision in this matter, but after appeal to the Employment Appeal Board, this matter was remanded to the Appeals Section for a new hearing. After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on April 4, 2006. Due to a recording problem resulting in the lack of an audible record, an order reopening the record was issued on April 21, 2006, and upon issuance of new hearing notices, a telephone hearing was held on May 5, 2006 to reconstruct the record. The claimant participated in the hearing and presented testimony from one other witness, Melissa La Fon. Lowell Dudzinski appeared on the employer's behalf. During the hearing, Employer's Exhibits One

through Six and Claimant's Exhibit A were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on July 14, 2003. He worked full time as a technician in the service department of the employer's automobile dealership. His last day of work was October 21, 2005. The employer discharged him on October 24, 2005. The reason asserted for the discharge was excessive tardiness.

The claimant's work schedule was 9:00 a.m. to 5:30 p.m., Monday through Friday, and occasional Saturdays. He had understood that when he was hired by Mr. Dudzinski, the service manager, that there was some flexibility in the start and end times to accommodate the claimant's occasional scheduling issues regarding his special needs son. He had not received any written warnings regarding punctuality until June 30, 2005. That warning stated that it was a "second warning" and that there had been several prior verbal warnings. However, the claimant denied that he had ever been verbally warned regarding punctuality, and Mr. Dudzinski could not specify when any prior verbal warnings might have occurred.

Between July 14, 2003 and June 30, 2005, the claimant had routinely, sometimes daily, clocked in after 9:00 a.m.; there were at least 245 occurrences where the claimant clocked in at 9:06 or later; of those, there were at least 90 occurrences where the claimant clocked in at 9:15 a.m. or after, and of those, there were at least five occurrences where the claimant clocked in at 10:00 a.m. or after. The administrative law judge finds that the claimant's assertion that he had been allowed a flexible start time prior to June 30, 2005 to be credible. The claimant further asserted that the employer began strictly enforcing the 9:00 a.m. start time as to him as a result of an argument on a service diagnosis issue that had occurred between the claimant and Mr. Dudzinski on June 27, 2005; the administrative law judge also finds that this assertion by the claimant is credible.

The June 30, 2005 warning specified that the claimant would receive another write up the next time he was over five minutes late; another write up for the next late after that, a three-day suspension without pay for the next late after that, and then termination for the next late after that. (Employer's Exhibit One.) The claimant was late (12:05 p.m.) on July 8, 2005 due to a family emergency; he was given a "third warning" "[second] written notice" on that date. The warning specified that the next late would result in a three-day suspension, and the next late after that would result in termination. (Employer's Exhibit Two). No mention was made of the other write-up to precede the suspension that had been referenced in the first written warning.

On August 2, 2005, the claimant called in an absence. He did not speak directly to Mr. Dudzinski until about 9:20 p.m. The employer imposed a three-day suspension and issued a second "third warning – written" for a late call in. The warning specified that the action that would be taken "if performance doesn't improve" was termination. (Employer's Exhibit Three.)

Between August 2 and October 21, 2005, the claimant clocked in between 9:01 a.m. and 9:05 a.m. on 15 days, but the employer said nothing further, evidently observing a five-minute margin of error, such as noted in the June 30, 2005 warning. On October 24, 2005, the

claimant was driving to work in a van he was purchasing from an acquaintance when he had a flat tire at approximately 8:50 a.m. He was yet several miles away from the employer, and he called the employer on his cell phone to report he had a flat and would be late. He then called his wife at her work and asked her to go home to pick up a spare tire. By the time Ms. La Fon went home, got the tire, and got to where the claimant was waiting with the van, it was approximately 10:45 a.m. By the time the claimant got the tire changed and arrived at the employer, it was approximately 11:15 a.m. He did some work on his flat tire, and when he was preparing to begin work at approximately 11:30 a.m., Mr. Dudzinski informed him that he was discharged.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
   a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
   b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
   a. Manifest equal culpability, wrongful intent or evil design; or
   b. Show an intentional and substantial disregard of:
      1. The employer's interest, or
      2. The employee's duties and obligations to the employer.

Henry, supra.

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 reason cited by the employer for discharging the claimant is excessive tardiness. Tardies are treated as absences for purposes of unemployment insurance law. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Absences or tardies due to issues that are of purely personal responsibility normally are not excusable. Higgins, supra; Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984). In this case, it is clear that the employer's amendment and strict enforcement of the claimant's punctuality was primarily punitive for other issues; the application of the employer's own warnings must be equally strictly applied to determine whether the claimant possessed the requisite element of intent to constitute misconduct. Cosper, supra; Higgins, supra. First, the plan for discipline changed after the first written warning on June 30, 2005 to omit a warning step. Next, the final warning and suspension was not for a tardy, but for a late call for an absence, which had not been not a stated ground for advancing the disciplinary steps. Lastly, the final warning specified termination would occur "if performance doesn't improve"; again, the performance addressed in the final warning was a late call for an absence, which did not reoccur, and to the extent the performance addressed was tardiness, the claimant's "performance" did improve from his prior record of punctuality.

The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's November 14, 2005 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/kjf