

**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**

**RICHARD A BYBEE  
PO BOX 182  
UNDERWOOD IA 51576-0182**

**ORIENTAL TRADING COMPANY  
c/o JOHNSON & ASSOCIATES  
NOW TALX UC EXPRESS  
PO BOX 6007  
OMAHA NE 68106-6007**

**Appeal Number: 04A-UI-03399-RT  
OC: 02/22/04 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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(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, Oriental Trading Company, filed a timely appeal from an unemployment insurance decision dated March 18, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Richard A. ByBee. After due notice was issued, a telephone hearing was held on April 19, 2004, with the claimant participating. Shari Armstrong, Human Resources Supervisor, participated in the hearing for the employer. The employer was represented by Lynn Corbeil of Johnson & Associates, now TALX UC eXpress. 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.

#### 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 warehouse order filler from September 23, 2002 until he was discharged on February 19, 2004 for poor attendance. On February 23, 2004, the claimant was absent because of illness. The claimant notified the employer but ten minutes late. The employer has a policy as shown at Employer's Exhibit 2, of which the claimant got a copy and of which he was aware, that provides that an employee must call in no later than two hours after the start of the employee's shift if that employee is going to be absent or tardy. The claimant called in ten minutes after the two-hour deadline. The claimant called in late because he was up most of the night with the flu and when he finally did get to sleep he overslept and when he woke up he immediately called the employer. The claimant was also absent on December 2, 2003 for personal illness, but this was properly reported. The claimant was also absent on August 27, 2003 for personal illness and this was properly reported. The claimant received a series of warnings as shown at Employer's Exhibit 1, the most recent of which was dated December 4, 2003, three months after the next most recent warning.

Pursuant to his claim for unemployment insurance benefits filed effective February 22, 2004, the claimant has received unemployment insurance benefits in the amount of \$669.00 as follows: \$150.00 for benefit week ending February 28, 2004 (earnings and vacation pay \$23.00) and \$173.00 per week for three weeks from benefit week ending March 6, 2004 to benefit week ending March 20, 2004. For benefit week ending March 27, 2004 the claimant reported earnings of \$450.00, which cancelled his benefits for that week.

#### 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. He is not.

Iowa Code Section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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) 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).

(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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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. 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. Although it is a close question, 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, namely, excessive unexcused absenteeism. The employer's witness, Shari Armstrong, Human Resources Supervisor, testified as to three absences the claimant had in the last six months of his employment. All three absences were for personal illness and two were properly reported. The one that was not properly reported was reported late by ten minutes because the claimant was up most of the night being sick and then had overslept through the time that he would properly report his absence. The

administrative law judge concludes that these absences were all for personal illness and properly reported or the claimant demonstrated good cause for not properly reporting the absences and therefore are not excessive unexcused absenteeism. The claimant did receive a number of warnings for his attendance as shown at Employer's Exhibit 1, the last of which was dated December 4, 2003, after which he only had one more absence as noted above. This absence was for personal illness and the claimant justified his late call on that absence. Accompanying the warning is an individual attendance exception, which hi-lights an absence on July 28, 2003 but does not hi-light the absence on August 27, 2003 and then hi-lights the absence on December 2, 2003. It also hi-lights an occasion where the claimant left work early on two different occasions, but the employer's witness, Shari Armstrong, Human Resources Supervisor, did not testify to these. There also appears to be a couple of tardies, but these were very brief and not hi-lighted on the warning nor testified to by Ms. Armstrong. The claimant testified that his tardies were not over five minutes. Based upon the evidence here, the administrative law judge concludes that the claimant's tardies were sufficiently minimal to not establish excessive unexcused absenteeism on their own. Further, the administrative law judge notes that the claimant received a warning for all of these on December 4, 2003 and thereafter the only evidence was the absence on February 23, 2004 which, as noted above, was for personal illness and the claimant demonstrated good cause for calling in late ten minutes. A discharge for any of these tardies or absences other than the one on February 23, 2004 would be for past conduct and a discharge for misconduct cannot be based on such past acts. It is true that past acts and warnings can be used to determine the magnitude of a current act of misconduct, but the administrative law judge finds no current act of misconduct.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that claimant's absences and tardies were not excessive unexcused absenteeism and disqualifying misconduct and, as a consequence, he is not disqualified to receive 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 his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he 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 \$669.00 since separating from the employer herein on or about February 19, 2004 and filing for such benefits effective February 22, 2004. 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 March 18, 2004, reference 01, is affirmed. The claimant, Richard A. ByBee, is entitled to receive unemployment insurance benefits provided he is otherwise eligible. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

kjf/b