

**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**

**CHRISTOPHER T TUSLER
2957 – 360TH ST
OSAGE IA 50461**

**WINNEBAGO INDUSTRIES
PO BOX 152
FOREST CITY IA 50436-0152**

**Appeal Number: 06A-UI-01915-DT
OC: 12/25/05 R: 02
Claimant: Appellant (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

STATEMENT OF THE CASE:

Christopher T. Tusler (claimant) appealed a representative's February 7, 2006 decision (reference 03) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Winnebago Industries (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 7, 2006. The claimant participated in the hearing. Lorna Zrostlik appeared on the employer's behalf. During the hearing, Employer's Exhibits One through Five 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 April 5, 1999. He worked full time as an advanced assembler in the employer's Charles City, Iowa, recreational vehicle assembly plant. His regular work schedule was 6:30 a.m. to 3:00 p.m., Monday through Friday. His last day of work was January 10, 2006. The employer discharged him on that date. The reason asserted for the discharge was his attendance.

The employer's attendance policy provides that employees receive a verbal warning when they reach 64 hours of absence, a written warning when they reach 72 hours of absence, and a suspension when they reach 80 hours of absence, with termination following thereafter.

On August 3, 2005, the claimant was given his documented verbal warning indicating that he had reached 68.6 hours of absenteeism, including 8.0 hours he missed on August 2, 2005 to take care of some personal business. On August 8, 2005, he was given a written warning indicating that he had reached 73.3 hours of absenteeism, including missing 4.8 hours on August 4, 2005 due to transportation issues. On August 19, 2005, he was given a two-day suspension because his absenteeism had exceeded 80 hours, including 8.0 hours with no report on August 18, 2005.

On December 14, 2005, the claimant was absent due to weather; the claimant lives approximately 20 minutes from the employer's facility. On December 15, 2005, he was given a second two-day suspension as his absenteeism was still in excess of 80 hours, specifically 81.4. The suspension document specified that the claimant had already been given one suspension in August, and that he "will not be afforded a third suspension for absenteeism in the next 12 months. Additional incidents of unexcused absence could result in further disciplinary action, up to and including termination."

On January 10, 2006, the claimant's roommate, who also worked at the employer and with whom the claimant normally got a ride to work, was not going into work. The claimant was going to drive his own vehicle into work, but had difficulty in getting it started, necessitating a jump start. He did not call the employer until 6:32 a.m., at which time he reported that he would be late. He did not report for work until about 7:33 a.m., at which time he was discharged. He asserted he should have been allowed to take some vacation time he had accrued to apply to the time he was late; however, the employer's policies require prior approval to take vacation time.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct. The issue is not whether the employer was right or even had any other choice but 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 decisions. 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, 11 (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).

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.

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). Incidents due to issues that are of purely personal responsibility, including reliable transportation, are not excusable. Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984); Higgins, supra. The claimant's final incident was not excused and was not due to illness or other reasonable grounds. The claimant had previously been warned that future occurrences could result in termination. Higgins, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's February 7, 2006 decision (reference 03) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of January 10, 2006. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged.

ld/kkf