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

CALEB LAND
425 BELKNAP
KEOKUK IA 52632

THE DIAL CORPORATION
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-04538-RT
OC: 03-27-05 R: 04
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.

_____
(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, The Dial Corporation, filed a timely appeal from an unemployment insurance decision dated April 18, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Caleb Land. After due notice was issued for a telephone hearing on May 19, 2005 at 2:00 p.m., the employer did not call in a telephone number, either before the hearing or 15 minutes after the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. The administrative law judge notes that the employer is represented by TALX UC eXpress which is well aware of the need to call in a telephone number in advance of the hearing if the employer wants to participate in the hearing. Although the

claimant had called in a telephone number where he purportedly could be reached for the hearing, when the administrative law judge called that number at 2:00 p.m., he reached a voice mail message for some business. The claimant was not there. The administrative law judge left a message that he was going to wait 15 minutes and if the claimant wanted to participate in the hearing, he needed to call before 15 minutes had expired or, should the hearing begin, before the hearing was over and the record was closed. No hearing was held and the claimant did not call by 2:15 p.m. The administrative law judge even called the claimant at a second number in Workforce Development records at 2:02 p.m. and reached a person who indicated the claimant was not there. The administrative law judge left a message with that person that the claimant needed to call within 15 minutes if he wanted to participate in the hearing. In both cases, the administrative law judge left an 800 number for the claimant to call. The claimant did not call by 2:15 p.m. nor did the employer and no hearing was held. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

The claimant called the administrative law judge at 2:17 p.m. on May 19, 2005. The administrative law judge explained that it was then too late to have the hearing and if he had the hearing he would need to also allow the employer an opportunity to participate in the hearing. The administrative law judge explained that he had called both the number the claimant had provided and also another number and the claimant was not at either number. The claimant stated that he was in the back room of the house and apparently did not hear the telephone ring. However, the claimant was aware that the hearing was at 2:00 p.m. but it slipped his mind and he forgot about the hearing. The administrative law judge informed the claimant that he would treat his phone call as a request to reschedule the hearing made after the time that the hearing had expired. Although the following rule speaks to a situation in which a party does not respond at all to a notice of appeal and telephone hearing, the administrative law judge believes it is relevant here.

871 IAC 26.14(7) provides:

> (7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.
>
> a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.
>
> b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.
>
> c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The administrative law judge concludes that the claimant has not demonstrated good cause to reschedule the hearing. The claimant testified that he knew the hearing was at 2:00 p.m. but

that it had slipped his mind and he had forgot about it and was not apparently near or available at the phone number he had left for the hearing. The claimant did state that he knew the hearing was at 2:00 p.m. The administrative law judge concludes that the claimant has not demonstrated good cause to reschedule the hearing and, as a consequence, the claimant's request to reschedule the hearing is hereby denied.

FINDINGS OF FACT:

Having examined the record, the administrative law judge finds: An authorized representative of Iowa Workforce Development issued a decision in this matter on April 18, 2005, reference 01, determining that the claimant was eligible to receive unemployment insurance benefits because Workforce Development records indicate that the claimant was dismissed from work on March 28, 2005 for alleged misconduct but the employer did not furnish sufficient evidence to show misconduct. Pursuant to his claim for unemployment insurance benefits filed effective March 27, 2005, the claimant has received unemployment insurance benefits in the amount of $1,550.00 as follows: $310.00 per week for five weeks from benefit week ending April 2, 2005 to benefit week ending April 23, 2005 and for benefit week ending May 21, 2005.

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 96.5-2-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.

The first issue to be resolved is the character of the separation. In its protest letter, the employer's representative states that the claimant was discharged on March 28, 2005. The employer did not participate in fact-finding but the claimant did and indicates, too, that he was discharged but gave no date. In its appeal letter, the employer's representative states that the claimant is considered to have abandoned his job after failing to return to work and it appears that the employer now maintains that the claimant quit. On the evidence here, the administrative law judge is constrained to conclude that the claimant did not leave his employment voluntarily but was discharged on March 28, 2005. 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 failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, including, excessive unexcused absenteeism. The employer did not participate in the hearing and provide sufficient evidence of acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The employer also did not provide sufficient evidence of absences or tardies on the part of the claimant that would establish excessive unexcused absenteeism and disqualifying misconduct.

Neither party participated in the hearing. In its protest letter the employer stated that the claimant was discharged for actions which can only be considered willful misconduct. The employer did not participate at fact finding but at fact finding, the claimant stated that he was discharged for absences or attendance. The claimant further stated that he received a notice in February 2005 concerning his attendance and that he was absent after that because of his asthma and was covered under FMLA but his FMLA leave was cancelled because he changed his address and he didn't get the notification that the employer needed more information. In any event, the claimant concedes that he was absent on March 25, 2005 for illness but he did

not have a telephone and his truck was in the shop being repaired and he could not call his absence in. The claimant stated that someone finally came to his home and saw that he was in trouble and took him to the hospital for treatment. The claimant stated that he went back to work on March 28, 2005 and his card was disabled and he could not enter the employer's property and he was escorted in and was allowed to clean out his locker and was escorted back off the property. In its appeal letter, the employer states that the claimant is considered to have abandoned his or her job after failing to return to work but that continuing work was available. The employer's appeal letter is basically silent about absences and the reasons for the absences. On the record here, the administrative law judge is constrained to conclude that the claimant did have absences but the absences were for personal illness or reasonable cause and were properly reported or the claimant had justification for failing to properly report the absences. Under these circumstances, the administrative law judge concludes that the claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for 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 sufficient to support a disqualification from unemployment insurance benefits must be substantial in nature including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes 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 $1,550.00 since separating from the employer herein on or about March 28, 2005 and filing for such benefits effective March 27, 2005. 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 of April 18, 2005, reference 01, is affirmed. The claimant, Caleb Land, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

pjs/pjs