

**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**

**LARRY L CALLENDAR
1412 REBECCA ST APT 1
SIOUX CITY IA 51103**

**WELLS DAIRY INC
PO BOX 1310
LEMARS IA 51031-1310**

**WORKERS HAVE RIGHTS TOO
PO BOX 3372
SIOUX CITY IA 51102-3372**

**Appeal Number: 04A-UI-09241-HT
OC: 08/01/04 R: 01
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:

The claimant, Larry Callendar, filed an appeal from a decision dated August 25, 2004, reference 01. The decision disqualified him from receiving unemployment benefits. After due notice was issued a hearing was held by telephone conference call on September 20, 2004. The claimant participated on his own behalf and was represented by Workers Have Rights Too. The employer, Wells Dairy, Inc. (Wells), participated by Human Resources Generalist Jamie Spangler. Customer Service Representative Kristy Murphy observed the proceeding but did not offer testimony. Exhibits One, Two and Three were admitted into the record.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Larry Callendar was employed by Wells from June 22, 2003 until August 3, 2004. He was a full-time helper.

The claimant received written warnings on January 14 and February 24, 2004, for not following the proper call-in procedure. In addition, he had received a copy of the policy when he was hired. Wells allows employees who have an unscheduled absence to leave a voice mail message on the call-in line or the voice mail of their supervisor. However, in addition, the employee must continue to call until the supervisor can be contacted and talked to directly. Mr. Callendar had failed to follow that policy on at least two prior occasions. He was notified his job was in jeopardy.

In June 2004, the claimant was approved for intermittent FMLA to help care for his mother. He anticipated he would have to spend time in her home caring for her, and he knew she did not have long-distance service on her telephone. The claimant never discussed any concerns about this with his supervisor or Human Resources Generalist Jamie Spangler, who approved his leave. The employer does have a toll-free number which is given to employees who may not have long distance service, but the claimant never made it known he would need to make special arrangements to call in when he was at his mother's home.

Mr. Callendar was taking care of his mother on August 1 and 2, 2004. This was not an emergency but was due to the fact his sister, who usually lived in with his mother, was going to be out of town. He called in and left voice mail messages but did not continue to call and talk to a supervisor, even though he knew his job was in jeopardy as a result of his prior failures to follow the proper call-in procedures. On August 2, 2004, the message was left on the voice mail of a supervisor who was on vacation and therefore no one knew the claimant was not going to be at work until he failed to show up. The message was not able to be retrieved until the claimant mentioned it on August 3, 2004.

The claimant was able to return to his home briefly on August 1, and 2, 2004, to use his own phone to call, because he had a neighbor stay with his mother. He chose not to stay and try to reach a supervisor, but returned to his mother's home. When he returned to work on August 3, 2004, he was three hours late due to not checking the schedule to see that his start time had changed from 7:00 p.m. to 4:00 p.m. He was discharged by Supervisor Alexander Scott for failure to follow the proper call-in procedure.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he is.

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) provide:

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.

The claimant was not discharged for missing work per se, but for failing to follow the required call-in procedure and talk directly to a supervisor when he was absent. He was aware of the policy, had been warned about it in the past, and told his job was in jeopardy as a result of his failure to follow it. Mr. Callendar could have made arrangements with the employer to get the toll-free number to use, but he did not mention this concern to anyone at Wells and no one had any idea he needed to have the toll-free number. In addition, the claimant could have made use of a pre-paid phone card and kept it with him for cases such as this when he would be at his mother's home where he did not have long distance.

The claimant did not mention how many calls he made to Wells on August 1 and 2, 2004, in an attempt to talk directly to a supervisor. He apparently made only the one call and did not attempt any further communication. The administrative law judge does not believe it would have taken substantially longer to call a second time and ask to speak to a supervisor, especially as the claimant knew the importance placed by the employer on talking personally with a supervisor. Although the claimant's absence was due to family illness, it cannot be considered to be properly reported which makes it an unexcused absence under Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for violation of a known

company rule after having received warnings. This is conduct not in the best interests of the employer and the claimant is disqualified.

DECISION:

The representative's decision of August 25, 2004, reference 01, is affirmed. Larry Callendar is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible.

bgh/tjc