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 P FENNELLY
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GOODWILL INDUSTRIES OF SE IOWA
C/O CAMBRIDGE/M BOYER
175 W JACKSON BLVD #1000
CHICAGO IL 60604

Appeal Number: 05A-UI-03205-RT
OC: 02-13-05 R: 04
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant, Larry P. Fennelly, filed a timely appeal from an unemployment insurance decision dated March 15, 2005, reference 02, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on April 13, 2005, with the claimant participating. The employer, Goodwill Industries of Southeast Iowa, did not participate in the hearing. The employer did not call in a telephone number where witnesses could be reached for the hearing as instructed in the notice of appeal and the administrative law judge received a message from the employer's representative that the employer was not going to participate in the hearing.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time store clerk from July 2004 until he was discharged on February 17, 2005 for poor attendance and, in particular, tardies. The claimant did have tardies. The claimant had recently obtained custody of his teenage son from Alabama and had to see to various matters concerning his son, including enrolling him in school and conducting other appointments. The claimant entered into an agreement with the store manager where the claimant was employed, Mary Knaack, that he could go ahead and be tardy and Ms. Knaack would permit him to be tardy but that the claimant would then have to make up his time. All of the claimant's tardies were related to his son. The claimant always made up the time missed by the tardies. The claimant had vacation time and sick time available to him but did not take it because of the agreement with Ms. Knaack. However, some of the assistant managers did not follow this agreement and treated the claimant's tardies as unexcused. The claimant did receive a written warning from Ms. Knaack but it was because of the actions of the assistant managers. Because of the agreement the claimant had with Ms. Knaack, he never realized that his job was in danger. The claimant was given no other reasons for his discharge.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from the employment was a disqualifying event. It was 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 claimant credibly testified, and the administrative law judge concludes, that he was discharged on February 17, 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 and tardies. 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, namely, excessive unexcused absenteeism and tardies. The employer did not participate in the hearing and provide a preponderance of the evidence of absences and tardies on the part of the claimant that were not for reasonable cause or personal illness and not properly reported. The claimant credibly testified that he had an agreement with the store manager where he was employed, Mary Knaack, that he could be tardy to work for matters related to his son if he made up his work that was missed. The claimant was tardy because of matters related to his son for whom he had just obtained custody. However, the claimant always made up his time for these tardies and did not believe that his job was in danger. Under these circumstances, and in the absence of any evidence to the contrary, the administrative law judge concludes that the claimant's tardies were excused by the employer and, therefore, were not excessive unexcused absenteeism and disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as 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 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.

DECISION:

The representative's decision of March 15, 2005, reference 02, is reversed. The claimant, Larry P. Fennelly, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct.

pjs/pjs