

**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**

**BERNON L STEWART
2604 N FOURTH ST #110
CLINTON IA 52732**

**ARCHER-DANIELS-MIDLAND COMPANY
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 04A-UI-04543-RT
OC: 03-28-04 R: 04
Claimant: Respondent (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
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Archer-Daniels-Midland Company, filed a timely appeal from an unemployment insurance decision dated April 14, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Bernon L. Stewart. After due notice was issued, a telephone hearing was held on June 1, 2004 with the claimant participating. Troy Bialas, Plant Superintendent, participated in the hearing for the employer. Josh Binder, Feed Out Superintendent, was available to testify for the employer but not called because his testimony would have been repetitive and was unnecessary. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

This matter was originally scheduled for a telephone hearing on May 14, 2004 at 10:00 a.m. and rescheduled at the employer's request.

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: The claimant was employed by the employer as a full-time gluten operator from June 11, 2001 until he was discharged on March 31, 2004. The claimant was discharged for poor attendance. On March 28, 2004, the claimant was absent. He called the employer prior to his shift and informed the employer that he would be late to work but that he would be coming to work. However, the claimant took some additional pain medication, went to sleep and never showed up for work and did not call the employer that he would not be returning to work. The employer has a policy of which the claimant was aware providing that an employee must notify the employer before the start of his or her shift of any absence or tardy. On January 1, 2004, the claimant was absent because he and his wife and his brother got into it and his wife threw the claimant out of his house. This absence was properly reported. On November 7, 2003, the claimant was absent and did not know why but it was properly reported. On August 20, 2003, the claimant was tardy because he and his wife had had a fight. This tardy was properly reported. On August 14, 2003, the claimant was absent because he had to leave work to visit his children in a shelter. This absence was properly reported. On June 30, 2003, the claimant was absent for a doctor's appointment. This absence was properly reported. On July 7, 2003, the claimant received a verbal warning for his attendance. On August 25, 2003, the claimant received a written warning for his attendance. On January 5, 2004, the claimant received a final written warning for his attendance.

Pursuant to his claim for unemployment insurance benefits filed effective March 28, 2004, the claimant has received unemployment insurance benefits in the amount of \$3,312.00 as follows: \$368.00 per week for nine weeks from benefit week ending April 3, 2004 to benefit week ending May 29, 2004.

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.
2. Whether the claimant is overpaid unemployment insurance benefits. 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.

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). The administrative law judge concludes that the employer has met 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 evidence establishes that the claimant had an absence on March 28, 2004 after informing the employer that he would be at work. The claimant called the employer before his shift was to start and informed the employer that he would be to work but would be late. However, the claimant took more medication, went to sleep and never showed up for work. Although the tardy may well have been for reasonable cause, the administrative law judge concludes that the claimant's absence was not for reasonable cause because he was awake and could have gone to work even had he taken the pain medication. However, the claimant laid back down, went to sleep and did not show up for work. His absence also was not properly reported because he did not call the employer back to inform the employer that he would be absent. The claimant was also absent on January 1, 2004 because his wife threw him out of the house. Although this was properly reported it is not for reasonable cause or personal illness. On November 7, 2003, the claimant was absent and did not know why. There is no evidence that this absence was for personal illness or other reasonable cause although it was properly reported. On August 20, 2003, the claimant was tardy because he and his wife had a fight. Although this tardy was properly reported, it was not for reasonable cause or personal illness. The claimant was absent

on August 14, 2003 because he went to see his children and this was properly reported. This absence was for reasonable cause. On June 30, 2003, the claimant was absent for a doctor's appointment. Because the claimant's doctor is two and one-half hours away from his home this absence was for personal illness. However, as noted above, the administrative law judge concludes that the claimant had three absences and one tardy which were not for reasonable cause and one of which was not properly reported. The administrative law judge is constrained to conclude that these establish excessive unexcused absenteeism. The claimant was on notice that his attendance was of concern to the employer having received a verbal warning on July 7, 2003; a written warning on August 25, 2003; and a final written warning on January 5, 2004.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant's absences and tardies as noted above were excessive unexcused absenteeism and disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

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 \$3,312.00 since separating from the employer herein on or about March 31, 2004 and filing for such benefits effective March 28, 2004, to which he is not entitled and for which he is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of April 14, 2004, reference 01, is reversed. The claimant, Bernon L. Stewart, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct, namely excessive unexcused absenteeism. The claimant has been overpaid unemployment insurance benefits in the amount of \$3,312.00.

tjc/tjc