

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

JOSHUA A BUCK
20890 – 160TH ST
BLOOMFIELD IA 52537

EXCEL CORPORATION
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-08132-RT
OC: 06-20-04 R: 03
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 96.5-1 – Voluntary Quitting
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Excel Corporation, filed a timely appeal from an unemployment insurance decision dated July 15, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Joshua A. Buck. After due notice was issued, a telephone hearing was held on August 18, 2004 with the claimant participating. Nicholas Statler, Human Resources Assistant Manager, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

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 production worker on the second shift from September 8, 2003 until he separated from his employment on June 23, 2004. The claimant was absent on June 21 and June 22, 2004 for a sinus infection. The claimant had a doctor's excuse. He properly reported his absence on June 21, 2004 but was unable to call the employer on June 22, 2004 because he continued to get a busy signal. The employer has a policy that requires that an employee who is going to be absent call in one-half hour before the start of the employee's shift. The claimant was aware of this policy. Because the claimant had these two absences, on June 23, 2004, well before the start of his shift, he called his supervisor, Mike Wright, and asked if he still had a job. Mr. Wright said no and to turn in his equipment. The claimant then came in to work that day and turned in his equipment.

The claimant had on one occasion expressed concerns to the employer about another employee but the situation was solved. The claimant expressed no other concerns to the employer and never indicated or announced an intention to quit if any of his concerns were not addressed by the employer. The claimant was absent on May 25 and May 26, 2004 for a personal illness but this was properly reported and the claimant properly provided a doctor's note. The employer requires a doctor's note for absences of more than one day. On April 14, 2004, the claimant was absent for personal illness and this was properly reported. On March 15 through March 21, 2004, the claimant was absent again for personal illness and this was properly reported and the claimant provided a doctor's note. On February 24 through February 27, 2004, the claimant was again absent for personal illness and this also was properly reported and the claimant provided a doctor's note. On February 16, 2004, the claimant was absent for personal illness and this was properly reported. On January 30, 2004, the claimant left work early. On January 19, 2004, the claimant was absent because his child was ill and this was properly reported to the employer. The claimant received three warnings for his attendance as follows: a written warning approximately February 16, 2004; a written warning on April 16, 2004; and a written warning on May 27, 2004.

Pursuant to his claim for unemployment insurance benefits filed effective June 20, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,428.00 as follows: \$238.00 per week for six weeks from benefit week ending June 26, 2004 to benefit week ending August 14, 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 not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

Iowa Code Section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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 first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit when he came to work on June 23, 2004 and turned in his equipment. The claimant testified that he was discharged when he called his supervisor on June 23, 2004 and was told that he no longer had a job and to turn in his equipment and the claimant then did so. 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 left his employment voluntarily. The employer's witness, Nicholas Statler, Human Resources Assistant Manager, testified credibly but from hearsay evidence that the claimant voluntarily quit. The claimant testified credibly that he was told that he no longer had a job by his supervisor, Mike Wright. Both witnesses agree that the claimant turned in his equipment on June 23, 2004. Mr. Statler testified that the claimant called Mr. Wright on June 24, 2004, one

day after turning in his equipment. This does not seem reasonable if the claimant had either quit or been discharged the day before and does cast doubt on the hearsay evidence testified to by Mr. Statler. Mr. Statler testified that supervisors such as Mr. Wright do not have the authority to discharge individuals but it may well be that Mr. Wright told the claimant that he would be discharged or did not have a job. Accordingly, although it is a close question, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant left his employment voluntarily and, as a consequence, the administrative law judge concludes that the claimant was discharged on June 23, 2004.

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. 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 witnesses seem to concede that the only potential reason for a discharge would be the claimant's absences. The witnesses seem to agree for the most part that the claimant had the absences as set out in the findings of fact and further agree that most of those absences were for personal illness and properly reported and for which the claimant had appropriate doctor's excuses. The claimant did not have a doctor's excuse for a one-day absence on April 14, 2004 and February 16, 2004 and January 19, 2004 but these absences were only for one day and the claimant did not need a doctor's excuse for absences of just one day. The claimant provided doctor's excuses for all absences of more than one consecutive day and, further, had a doctor's excuse for the two most recent absences on June 21 and June 22, 2004 but was unable to properly use it because he was informed that he no longer had a job. The witnesses did disagree as to whether the claimant properly reported his absence on April 14, 2004 and June 21 and June 22, 2004. The administrative law judge must conclude that there is not preponderance of the evidence that the claimant failed to properly report his absences on April 14, 2004 and June 21, 2004. On June 22, 2004, the claimant conceded that he did not call in his absence but attempted to do so but was unable to reach the employer because the line was always busy. The administrative law judge concludes that there is not a preponderance of the evidence that the claimant did not make a sufficient effort to contact the employer on that day. Accordingly, the administrative law judge concludes that claimant's absences were for reasonable cause or personal illness and properly reported and a doctor's excuse provided when necessary and, therefore, are not excessive unexcused absenteeism. The administrative law judge does note that the claimant received three written warnings as set out in the findings of fact but, nevertheless, concludes that the claimant's absences were not excessive unexcused absenteeism. Whether absences are excessive and unexcused does not depend upon an employer's point system but rather examines the reasons for the absence and whether the absence was properly reported.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct, and, 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 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 \$1,428.00 since separating from the employer herein on or about June 23, 2004 and filing for such benefits effective June 20, 2004. 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 July 15, 2004, reference 01, is affirmed. The claimant, Joshua A. Buck, 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.

tjc/tjc