

**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

**BRANDI L BROOKS
1916 – 59TH ST
DES MOINES IA 50322**

**MAXIMUS INC
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 04A-UI-01916-RT
OC: 01-11-04 R: 02
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, Maximus, Inc., filed a timely appeal from an unemployment insurance decision dated February 18, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Brandi L. Brooks. After due notice was issued for a telephone hearing on March 11, 2004, at 10:00 a.m., the administrative law judge was unable to reach the claimant at the number she had called in. 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. Consequently, no hearing was held. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment

insurance records for the claimant. The administrative law judge attempted to call the claimant at the telephone number that she had provided at 10:00 a.m., 10:02 a.m. and 10:12 a.m. The phone rang many times and no one ever answered the phone.

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 February 18, 2004, reference 01, determining that the claimant was eligible to receive unemployment insurance benefits because Iowa Workforce Development records indicate that the claimant was discharged from work on December 10, 2003 for excessive absences but her absences were due to illness and were properly reported and are not disqualifying misconduct. Pursuant to her claim for unemployment insurance benefits filed effective January 11, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,776.00 as follows: \$222.00 per week for eight weeks from benefit week ending January 17, 2004 to benefit week ending March 6, 2004.

REASONING AND CONCLUSIONS OF LAW:

The issues 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. She 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, (7) 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).

(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). 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. Neither party participated in a hearing and no hearing was held. In the letter accompanying its protest, the employer's representative merely states that the claimant voluntarily quit for health reasons. The employer did not participate in fact-finding. The claimant stated at fact-finding that she was discharged but not given a reason but believed it was because she had been gone a week when her aunt died. The claimant was given emergency information that her aunt was about to die. The claimant stated that she informed her supervisor that they had just gotten a call and had to go to Chicago. The claimant and her family flew to Chicago. Her aunt survived for a few days but died on December 19, 2003. The claimant called the employer on December 16, 2003 and said that she would be flying home the next day, December 17, 2003. On that day, the claimant was called and told that she was terminated. The claimant furnished the employer a copy of the obituary and plane tickets. The employer maintained that there was no proof she was going to visit a terminally ill relative and discharged the claimant. The claimant stated that she was not aware that she could take FMLA leave and that she had no personal days or vacation. In its appeal letter, the employer merely states again that the claimant voluntarily quit for health reasons. The administrative law judge concludes that there is not a preponderance of the evidence that the claimant voluntarily quit but rather the evidence, such as it is in the administrative file, shows that the claimant was discharged.

The discharge appears to have been for attendance. On the strength of the evidence in the administrative file, the administrative law judge is constrained to conclude that claimant's absences were for reasonable cause and properly reported and not excessive unexcused absenteeism. There is no evidence that the claimant ever received any warnings or disciplines for her attendance or any evidence that she had other attendance problems. Accordingly, the administrative law judge concludes that claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct, and, as a consequence, she 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 her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she 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 \$1,776.00 since separating from her employer on or about December 10, 2003 and filing for such benefits effective January 11, 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 February 18, 2004, reference 01, is affirmed. The claimant, Brandi L. Brooks, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

tjc/b