

**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**

**DONNA L JOHNSON
1210 S NEWTON
SIOUX CITY IA 51106**

**WESTERN STATES MFG CO INC
811 MAIN ST
SIOUX CITY IA 51103**

**Appeal Number: 04A-UI-12664-DT
OC: 10/24/04 R: 01
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

STATEMENT OF THE CASE:

Western States Manufacturing Company, Inc. (employer) appealed a representative's November 16, 2004 decision (reference 01) that concluded Donna L. Johnson (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 16, 2004. The claimant participated in the hearing. Craig Breese appeared on the employer's behalf. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on June 17, 2004. She worked full time as a production worker in the employer's tire repair product manufacturing business. Her work schedule was from 8:00 a.m. to 4:30 p.m., Monday through Friday. Her last day of work was October 18, 2004. The employer discharged her on October 19, 2004. The reason asserted for the discharge was excessive absenteeism and tardiness.

On October 19, the claimant, who lived about 10 to 15 minutes away from the employer's workplace, left work at about 7:40 a.m. On her route, a train at a crossing stopped her so long that she knew would be at least a few minutes late for work. Because of a prior warning, after getting through the crossing the claimant stopped at a pay phone and called her husband and asked him to call the employer to report she would be a few minutes late. The husband immediately called the employer; at this point the claimant was already ten minutes late. Mr. Breese, the production manager, spoke to the husband and told him to tell the claimant not to bother coming in, that she was discharged.

During the claimant's employment with the employer, she had the following attendance occurrences:

Date	Occurrence/reason if any
07/05/04	Absent, sick.
07/16/04	Late 5 minutes returning from lunch.
08/03/04	Absent, sick.
08/16/04	Absent, sick.
08/26/04	Absent, car trouble.
08/27/04	
08/31/04	Tardy five minutes, taking husband to work.
09/16/04	Absent 4 hours, sick.
10/13/04	Absent 4 hours, husband work problem.

After the claimant's last tardy occurrence before October 19, Mr. Breese told the claimant that she should not bother coming in if she was tardy again. When the claimant was tardy on October 19 because of the train, he did not consider that a reasonable excuse because if the claimant had taken a slightly different route, she would not have had to go over the train crossing, and so could have avoided that being a possible reason for her being late. The claimant had not previously been late due to the train in the past, as the train was usually through the crossing by 7:45 a.m. On this occasion, because of the positioning of the crossing with the intersection with the other road the claimant could have taken, she did not realize the crossing was blocked until she had passed the intersection, and then she was blocked in and could not turn back to the other road.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not

whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. Tardies are treated as absences for purposes of unemployment insurance law. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Unavoidable occurrences cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline for the occurrence under its attendance policy. Cosper, supra. While it is true that greater foresight would have prevented the claimant from taking the route that had the railroad crossing, her failure to realize the potential problem until she was caught at the crossing on October 19 was not unreasonable. Because the final tardy was related a reasonable grounds, no final or current incident of unexcused absenteeism or tardiness occurred which establishes work-connected misconduct and no disqualification is imposed. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's November 16, 2004 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

ld/tjc