

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

BULAKALI MUGANZA
2920 SHADOW CREEK LN
DES MOINES IA 50320

DES MOINES WATER WORKS
2201 GEORGE FLAGG PKWY
DES MOINES IA 50321

Appeal Number: 05A-UI-07646-DT
OC: 11/07/04 R: 02
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
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Bulakali Muganza (claimant) appealed a representative's July 22, 2005 decision (reference 04) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with the Des Moines Water Works (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 11, 2005. The claimant participated in the hearing. Dorenda Walters appeared on the employer's behalf. 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 8, 2005. He worked full time as a temporary grounds laborer. His last day of work was June 29, 2005. The employer discharged him on that date. The reason asserted for the discharge was excessive tardiness.

The employer's attendance policy provides that if an employee is tardy three times in a month he will be discharged. The employer asserted that the claimant had been a few minutes late at least getting to the table for the morning meeting on three occasions, June 9, June 10, and June 20, and that nothing was said on June 9, that he was verbally reminded of the "three-strike" policy on June 10, and advised he had his second strike on June 20. The claimant denied that he was late on these occasions, and further denied that he was warned on any of these occasions he was being assessed a "strike." He acknowledged that on one of the occasions at the morning group meeting the entire crew was reminded about the three-strike policy, but denied that there was any such statement directed specifically at him.

The claimant acknowledged that he had been 15 to 20 minutes late on June 14, 2005 due to traffic and again on June 29, 2005 due to needing to give medication to a sick child before leaving home. He denied that anything was said to him on June 14 to indicate he had incurred his first strike. When the claimant arrived late on June 29, he was informed that he was discharged.

The claimant established an unemployment insurance benefit year effective November 7, 2004. He filed an additional claim effective June 26, 2005.

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 §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.

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). Employer asserted that the claimant had exceeded the allowable tardies and had received prior warning. However, the claimant denied he had been tardy more than twice and denied that he had been informed the employer considered him to have incurred his first and second strikes. No first-hand witness was available at the hearing to provide testimony to the contrary under oath and subject to cross-examination. The employer relies exclusively on the second-hand account from the claimant's supervisor; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the supervisor had been mistaken, whether he is credible, or whether the employer's witnesses might have misinterpreted or misunderstood aspects of his report. Under the circumstances, the administrative law judge finds the claimant's first-hand information more credible. The administrative law judge notes that in the absence of the supervisor's testimony, a documented written warning given to and signed by the claimant could have established that the claimant had been given prior warning; however, the employer has made a business decision not to use a written warning process for tardiness. The employer, however, has not established that the claimant had previously been warned that further tardies could result in termination. Higgins, supra. 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.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base-period employer. Iowa Code Section 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters

immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code Section 96.19-3. The claimant's base period began July 1, 2003 and ended June 30, 2004. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's July 22, 2005 decision (reference 04) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The employer's account is not subject to charge in the current benefit year.

ld/tjc