IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

JOSEPH PROVENZANO
Claimant

SECURITAS SECURITY SERVICES USA
Employer

APPEAL NO. 10A-UI-13999-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09-05-10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the October 1, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 23, 2010. The claimant participated in the hearing. Brian Chatham, Human Resources Manager, and Jacqueline Jones, Employer Representative, participated in the hearing on behalf of the employer. Employer's Exhibit One and Claimant's Exhibit A were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time security officer for Securitas Security Services USA from March 19, 2008 to August 31, 2010. He was discharged for violating the employer's attendance policy. The employer uses a no-fault attendance policy and employees are terminated upon reaching 4.5 points in a rolling three-month period. An absence with four hours' notice is assessed one point; an absence with less than four hours' notice is assessed two points because it is more difficult to find a replacement and avoid overtime; an incident of tardiness of less than 90 minutes is assessed one-half point; and an incident of tardiness of more than 90 minutes is assessed one point.

The claimant was absent June 1, 2010, and received one point because he was experiencing what seemed to be an eye infection and went to an eye doctor, where his eyes were dilated. He was diagnosed with a form of herpes that causes chronic eye infections that can generally be controlled with medication and was referred to Wolfe Eye Clinic. At one point in early June 2010, he was unable to afford his medication and his physician changed his medication from one to another. One of the effects of the eye infections was that bright lights, such as headlights, caused stress to his eye so he could not see when he was driving to his shift that began at 11:30 p.m. On June 16, 2010, he attended a safety meeting in Des Moines while experiencing a flare-up with his eye and was told by the branch manager he should not return to

work when that happened in the future until his eye had been treated and he had a note from his doctor approving his release to return to work. On June 21, 2010, he called at 4:00 p.m. for his 11:30 p.m. shift and notified the employer he had to take his pregnant fiancée to the hospital because she was having problems with her pregnancy and he received one point. On August 23, 2010, he called in at least four hours before the start of his shift and notified the employer he was sick and would not be in and received one point. On August 29, 2010, he called the employer at least four hours prior to his shift and stated his eye was bloodshot and blurry and he could not work and received one point, for a total of four points. On August 30, 2010, the claimant did not arrive at work on time. The employer called him to find out why and the claimant indicated he forgot to set his alarm and overslept. He arrived between 20 and 40 minutes late with a doctor's excuse for his August 29, 2010, absence and was assessed one-half point. His employment was terminated by phone August 31, 2010, for violating the employer's attendance policy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an

unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Two of the claimant's 4.5 attendance points were due to eye flare-ups caused by his chronic eye infections, one was due to another illness he experienced, and the other was due to problems his fiancée had with her pregnancy. The final absence was an incident of tardiness when he forgot to set the alarm and overslept. Consequently, three of his points were due to properly reported illness, one point was due to problems with his fiancée's pregnancy, and one-half point was due to oversleeping. Of that number, at least three were due to properly reported illness and cannot count against his total of unexcused absences, which leaves 1.5 points. It was not unreasonable for the claimant to accompany his fiancée to the hospital when they thought there was something wrong with the pregnancy. The tardiness due to oversleeping was not excused. Even if the administrative law judge counted the absence due to taking his fiancé to the hospital as unexcused, that would leave a total of 1.5 unexcused attendance points. While the claimant did exceed the allowed number of attendance points under the employer's no-fault attendance policy, the administrative law judge must look at which of those absences would be considered unexcused under Iowa law. In this case, the claimant had, at most, 1.5 attendance points out of a total of 4.5. Therefore, benefits must be allowed.

DECISION:

The October 1, 2010, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

_____
Julie Elder
Administrative Law Judge

_____
Decision Dated and Mailed

je/kjw