IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DUSTIN L SWANSON
Claimant

SABRE COMMUNICATIONS CORP
Employer

APPEAL NO: 15A-UI-03868-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/22/15
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Dustin L. Swanson (claimant) appealed a representative's March 19, 2015 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Sabre Communications Corporation (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 7, 2015. The claimant participated in the hearing. Erin Baird appeared on the employer's behalf. One other witness, Kelli Beach, was available on behalf of the employer but did not testify. 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?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on January 28, 2013. He worked full time as a welder/fitter in the employer's business manufacturing wireless communication towers and utility poles. His last day of work was February 25, 2015. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism.

The claimant had virtually no attendance issues until December 9, 2014, when he received a point for an absence related to oversleeping. He had an additional half-point on December 22 for leaving work early. In January 2015 he had a half-point for a tardy on January 19 and points for absences on January 27 and January 28. In February he had half-points for leaving early on February 6, February 13, and February 17, and full points for absences on February 11, February 18, February 20, and February 24. After offset for a point he earned back on

January 31, as of February 25 he was at 8.5 points under the employer's six-point attendance policy.

The employer had never given the claimant a formal warning regarding his attendance. The employer was aware that the claimant was undergoing some personal family and medical issues. He and his wife were in the process of divorcing, and in January he had been diagnosed with severe depression. On February 2 the employer had met with the claimant and had verbally advised him that he was missing too much work, but suggested that perhaps some of the absences could be covered by a medical leave. The claimant did subsequently turn in some doctor's papers on about February 16, but the days indicated in that documentation did not apply to any of the days the employer was assessing points.

In the period of February 17 through February 24 the claimant was having some difficulty in adjusting to a change in medications, and on at least one of those days he had been sent home because he was not in a medically safe condition to work. All the points during that week but the absence on February 20 were in some way related to this medical condition; the absence on February 20 was due to a transportation issue involving a flat tire. The claimant had seen by his doctor on February 17 and February 18, and believed he had given doctor's notes for those days to his lead worker on or about February 19. He had not been seen by his doctor on February 24, but had spoken to the doctor's office by phone.

When the claimant came in for work on February 25, he was informed that he was being discharged for his attendance. Later that day his doctor's office did send in a note by fax excusing the claimant from work on February 17, February 18, and February 24, but since the discharge had already occurred, the employer did not accept this as excusing those occurrences.

REASONING AND CONCLUSIONS OF LAW:

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). The question 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 matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Excessive unexcused absenteeism can constitute misconduct. Rule 871 IAC 24.32(7). 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. Misconduct connotes volition. *Huntoon*, supra. Absences due to properly reported illness 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 up to or including discharge for the absence under its attendance policy. Rule 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). Here, the employer knew or should have known that the vast majority of the claimant's absences were related to a known situation including a medical issue. *Floyd v. Iowa Dept. of Job Service*, 338 N.W.2d 536 (Iowa App. 1986). The mere failure to provide doctor's excuses for all of those incidents does not make those incidents intentional or unexcused for purposes of determining unemployment insurance eligibility. Here, no final or current incident of intentional or unexcused absenteeism occurred to establish 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 March 19, 2015 decision (reference 01) 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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