

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LUCAS D BRIGGS**

Claimant

**APPEAL NO: 13A-UI-04498-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FERRARA CANDY COMPANY**

Employer

**OC: 03/24/13**

**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Ferrara Candy Company (employer) appealed a representative's April 9, 2013 decision (reference 01) that concluded Lucas D. Briggs (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 May 22, 2013. The claimant participated in the hearing. Robin Travis 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?

**OUTCOME:**

Affirmed. Benefits allowed.

**FINDINGS OF FACT:**

The claimant started working for the employer on July 26, 2010. He worked full time as a packaging machine operator on the first shift. His last day of work was March 26, 2013. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism.

The employer has an eight-point attendance policy. As of January 25, 2013 the claimant was at seven points and was given a written warning to that effect. The seven points were from two tardies, one refusal of overtime, and four absences, some of which were for personal reasons.

The employer's attendance policy also requires an absence to be called in at least one hour prior to the scheduled shift; in the claimant's case, his shift started at 7:00 a.m., so he would need to call in by 6:00 a.m. A failure to call in by this time will result in the absence being treated as unexcused and will be assessed an additional half point penalty.

On March 25 the claimant was absent, but he did not call in to report the absence until approximately 6:40 a.m. The reason for the absence and the late call was that while the claimant had gotten up early enough to care for and clean up his son who had been sick with an intestinal bug, and to get himself ready to go to work, as the claimant started to go out the door at about 6:20 a.m., plenty of time for him to get to work on time, he became physically ill himself. After the claimant attended to his own physical needs, he then called in at about 6:40 a.m. to report he would be absent. The employer then assessed him 1.5 points for this absence, and on March 26 discharged him.

### **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. 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. 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. 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. 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. 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. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). In this case, the employer asserts that the reason for the final absence was not properly reported. However, it is clear that the claimant's failure to report his final absence on March 25 at least an hour before the start of his shift was not volitional, as he had not become ill until after the 6:00 a.m. reporting time had passed; he did report the absence as soon as he was physically able. 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 April 9, 2013 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 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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