

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

**LUKE DENNIS
PO BOX 163
ALTOONA IA 50009**

APPEAL NO: 11A-UI-09765-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

**NPC INTERNATIONAL INC
PIZZA HUT
c/o ERNST & YOUNG
PO BOX 226776
DALLAS TX 75222-6776**

APPEAL RIGHTS:

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:

***Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Or
Fax Number: 515-281-7191***

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.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

The name, address and social security number of the claimant.

A reference to the decision from which the appeal is taken.

That an appeal from such decision is being made and such appeal is signed.

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.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

ONLINE RESOURCES:

UI Appeals: <http://www.iowaworkforce.org/ui/appeals/index.html>

National Career Readiness Certificate through the Skilled Iowa Initiative: <http://skillediowa.org/>

Becoming a member employer through Skilled Iowa and utilizing internships: <http://skillediowa.org/>

Facts About Unemployment Handbook: <http://www.iowaworkforce.org/ui/handbook.htm>

Employer account access and information: <https://www.myiowaui.org/UITIPTaxWeb/>

<http://www.iowaworkforce.org/ui/uiemployers.htm>

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LUKE DENNIS
Claimant

APPEAL NO: 11A-UI-09765-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

NPC INTERNATIONAL INC
Employer

**OC: 06/12/11
Claimant: Respondent (2R)**

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 15, 2011, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 10, 2013. The claimant did not participate in the hearing as he has been incarcerated since March 24, 2012, was unavailable for several previously scheduled hearings for the same reason, and will not be released until January 28, 2014. Paul Vogelsberg, General Manager and Carla Veach, Compliance, participated in the hearing on behalf of the employer. Employer's Exhibits One and Two 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 part-time cook for Pizza Hut from February 12, 2011 to June 10, 2011. He was discharged from employment due to a final incident of absenteeism that occurred on June 10, 2011.

The employer's attendance policy requires an employee to call the employer personally, at least two hours before the start time of his shift. It also requires an employee to find his own replacement and provide a doctor's excuse for an absence due to illness.

The claimant worked from 5:00 p.m. to 8:00 or 9:00 p.m. On May 5, 2011, the claimant was scheduled to work at 5:00 p.m. He had his wife call in for him at 5:00 p.m. to report he would not be there because he was ill. The employer issued him a verbal warning in writing for failing

to call two hours before the start time of his shift, failing to find a replacement worker and having his wife call in for him (Employer's Exhibit One).

On May 24, 2011, the claimant was scheduled to start his shift at 5:00 p.m. He had his wife call in for him stating he had food poisoning from something he ate earlier at a fast food restaurant. The employer issued him a written warning, noting that he demonstrated a pattern of having his wife call in for him, failing to call at least two hours prior to the start time of his shift and failing to find a replacement worker (Employer's Exhibit Two). The warning, signed by the claimant, also stated, "Failure to correct and maintain this performance discrepancy may result in termination" (Employer's Exhibit Two).

On June 8, 2011, the claimant's wife again called in for him around the start time of his shift. The employer's termination description reported, "(The claimant) is being terminated for excessive absenteeism and tardiness. (The claimant) was given a verbal warning on May 6, 2011, and a written warning on May 26, 2011, and was told if he was ill he needed to call in at least two hours prior to his shift and that he needed to call in himself, not have someone else call in for him." The employer terminated the claimant's employment June 10, 2011.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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(7) provides:

(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.

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

On the other hand, 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). The standard in attendance cases is whether the claimant had an excessive unexcused absenteeism record. (emphasis added). While the employer's policy may count absences accompanied by doctor's notes as unexcused, for the purposes of unemployment insurance benefits those absences are considered excused in most cases.

While the claimant may have been ill May 5, May 24 and June 8, 2011, he failed to properly report those absences. Despite being verbally counseled and receiving a written warning about these issues previously, the claimant still failed to call in at least two hours prior to the start of his shift, directed his wife to call in for him rather than making the call personally, and did not find a replacement worker for any of those shifts. The employer has established that the claimant was warned that further improperly reported absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of failing to properly report his absences, is considered excessive. Therefore, benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The July 15, 2011, reference 01, decision is reversed. The claimant was discharged from employment due to excessive, improperly reported absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs

