

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KERRY E. MCMULLEN**  
Claimant

**APPEAL NO: 17A-UI-08525-JE-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DEE ZEE INC**  
Employer

**OC: 07/02/17**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the August 16, 2017, reference 05, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 7, 2017. The claimant participated in the hearing. Lacey Little, Human Resources Specialist, participated in the hearing on behalf of the employer.

**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 assembler/packager for Dee Zee Inc. from October 27, 2014 to June 30, 2017. He was discharged for attendance issues.

The employer's attendance policy is a point-based, no fault policy based on a rolling calendar year and employees are assessed one point per hour of work missed. Points drop off after one year. Termination occurs when an employee accumulates 48 points within a rolling calendar year. The policy is contained in the handbook, is available online and is discussed in orientation. Employees can check their point totals in the payroll system.

The employer does not have a record of all of the claimant's points or the reasons for his absences but stated he had 85 points at the time of termination. The claimant was either tardy or left early March 13, 2017, and was assessed two points; he was either tardy or left early March 31, 2017, and was assessed two points; and was either tardy or left early April 3, 2017, and was assessed two points; he was absent four hours April 14, 2017, and was assessed four points, he was absent six hours April 17, 2017, and was assessed six points; he was absent for his shift April 25, 2017, and was assessed eight points; he was either two hours tardy or left two hours early June 8, 2017, and was assessed two points; he was either three hours tardy or left three hours early June 9, 2017, and was assessed three points; and he was absent for his shift June 12, 2017, and was assessed eight points.

The employer issued the claimant a written warning for attendance April 17, 2017. The claimant was experiencing transportation issues and some health problems which caused his absences. He testified the employer tried to work with him on his attendance.

### **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, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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).

While the claimant may have had 85 attendance points at the time of termination, the employer could only list nine incidents which resulted in 37 attendance points, rather than the 48 points required for termination. Additionally, neither party could state the reason for the claimant's last absence with certainty so it is unknown whether the June 12, 2017, absence was due to illness or transportation issues. If the final absence was related to properly reported illness, no final or current incident of unexcused absenteeism has been established. If it was due to transportation, it is not considered an excused absence. The employer has the burden of proving disqualifying job misconduct, and has not provided enough evidence necessary to show the claimant had the requisite number of attendance points to result in termination or the reason for his last absence. Furthermore, the claimant's last absence occurred June 12, 2017, but his employment was not terminated for 18 days, taking his final absence out of the realm of a current act of misconduct. Consequently, even if the employer had demonstrated disqualifying job misconduct, the claimant would still be allowed benefits because his last absence was not a current act of misconduct. For the reasons stated above, benefits must be allowed.

**DECISION:**

The August 16, 2017, reference 05, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/scn