

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JASON M SCHMIDT
Claimant

APPEAL NO: 13A-UI-04377-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DEERY BROTHERS INC
Employer

OC: 03/17/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Deery Brothers, Inc. (employer) appealed a representative's April 1, 2013 decision (reference 01) that concluded Jason M. Schmidt (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 21, 2013. The claimant participated in the hearing. Jackie Nolan of Employer's Unity appeared on the employer's behalf and presented testimony from one witness, Ron Bennett. 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 May 3, 2011. He worked full-time as a lube tech in the employer's West Burlington, Iowa car dealership. His last day of work was March 15, 2013. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism.

The claimant had a high but unspecified number of tardies in 2012; he had only missed about two or three full days of work, which were due to illness. He was tardy on January 2, 2013 and was given a verbal warning, and was again tardy on January 3, after which he was given a final written warning.

The claimant had previously arranged with the employer to leave work early on Monday, March 11 so that he could go to an afternoon appointment with an attorney. The employer had approved this partial absence. This appointment was a previously scheduled appointment to

deal with a pending eviction. When the claimant got home on Friday, March 8, he got a phone message that another attorney with whom he had been trying to schedule an appointment to discuss his pending divorce had an opening in his schedule at 8:00 a.m. on March 11. As a result, on the morning of March 11, prior to the start of his scheduled shift, he called the employer to indicate that he needed to be off the entire day so he could cover both attorney appointments. Bennett, the fixed operations manager, took the call, and told the claimant, "Okay."

The employer then determined that the full absence on March 11 was a violation of the January 3 final warning. As a result, the employer discharged the claimant on March 15.

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). Tardies are treated as absences for purposes of unemployment insurance law. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). However, in order to establish the necessary element of intent for misconduct, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of his job. *Cosper*, supra; *Higgins*, supra. The incidents which lead to the claimant's final warning were not full absences, but tardies. The claimant reasonably believed that it had been his tardiness which had triggered the final warning, and that he had taken the proper actions so that his absence on March 11 would be excused. His absence that day was not an intentional violation of the employer's attendance expectations or his final warning. 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 1, 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/tll