

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DEREK E HOUSEHOLDER**  
Claimant

**APPEAL NO: 08A-UI-08235-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TERRY'S WELDING INC**  
Employer

**OC: 07/13/08 R: 02  
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Derek E. Householder (claimant) appealed a representative's September 4, 2008 decision (reference 02) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Terry's Welding, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 30, 2008. The claimant participated in the hearing. Terry Wagner 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?

**FINDINGS OF FACT:**

The claimant started working for the employer as a regular employee in approximately August 2006. He worked full time as a welder/builder in the employer's welding shop. As of April 2008, his regular work schedule was 7:00 a.m. to 5:00 p.m., Monday through Friday, with some Saturday overtime. His last day of work was June 23, 2008. The employer told him on that date that he needed to leave and look for a new job. The reason asserted for the discharge was excessive absenteeism.

Since January 1, 2008, the claimant had missed approximately 250 hours from what he normally would have been scheduled to work. Between 75 percent and 80 percent of this missed time were partial days missed rather than full days missed. At least 50 percent of the time missed was due to some type of medical or health issue. The claimant frequently reported illness due to migraine, back pain, or complications of his diabetes.

The employer had expressed concern to the claimant several times regarding the amount of time the claimant was missing, and the claimant realized that it might even be getting to the point that his absences were placing his job in jeopardy. On June 23 the claimant called the employer at approximately 6:45 a.m., about 15 minutes prior to the scheduled start of his work

day, and informed the employer that he had been sick with a migraine and would be about an hour late. When the claimant arrived at about 8:00 a.m., the employer indicated that he was tired of the claimant missing so much work and that the claimant should look for other employment.

### **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).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 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). A determination as to whether an absence or tardy is excused or unexcused does not rest solely on the employer's interpretation of what should be considered excused. Absences or tardies 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 impose discipline up to or including discharge for the absence or tardy. 871 IAC 24.32(7); Cosper, supra; Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007). Here, because the final tardy was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. While the employer had an understandable reason for ending the claimant's employment, it 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 September 4, 2008 decision (reference 02) 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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