

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARCO GUERRERO**

Claimant

**APPEAL NO: 12A-UI-10759-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DES MOINES REGISTER & TRIBUNE**

Employer

**OC: 08-12-12**

**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the August 30, 2012, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on October 2, 2012. The claimant participated in the hearing with his daughter, Marcella Guerrero. Dottie Klootwyk, principle human resources partner, and Bill White, assistant operations manager, participated in the hearing on behalf of the employer. Employer's Exhibits One through Eight 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 mailroom trainee for Gannett Publishing Services from July 23, 2002 to August 12, 2012. He was discharged for exceeding the employer's allowed number of attendance occurrences. The employer uses a rolling calendar year attendance policy and five incidents of tardiness within a calendar year results in termination of employment. The claimant received a written warning January 24, 2011, after he was 15 minutes tardy January 4, 2011, which was his third occurrence within a 12-month period (Employer's Exhibit One). He received a written warning June 8, 2011, after he was 28 minutes tardy June 5, 2011, which was his third occurrence within a 12 month period; he received a written warning and a three-shift suspension June 21, 2011, after he was 20 minutes tardy June 18, 2011, which was his fourth occurrence within a 12-month period; he received a written warning May 2, 2012, after he was one hour and 45 minutes tardy April 27, 2012, which was his third occurrence within a 12-month period; and he received a written warning and three-shift suspension June 14, 2012, after he was 15 minutes tardy May 21, 2012, which was his fourth occurrence within a 12-month period. On August 5, 2012, the claimant was 15 minutes tardy because his ride did not show up and he started walking to work. His supervisor called to ask where he was and when the claimant explained he was walking to work, his supervisor picked him up and took him to work. That incident of tardiness was the claimant's fifth occurrence within a 12 month rolling period and his employment was terminated August 12, 2012.

The claimant's first language is Spanish. He did not always understand what the employer was saying to him but would indicate agreement anyway. He reads and writes English at a first to third grade level. He was not aware of how to ask for union representation throughout this procedure or how to ask what programs, such as family and medical or other leave or disability programs, the employer offered. The claimant's son is 30 years old, schizophrenic, and lives with the claimant. Some nights, when his son was off his medication, he would have episodes and the claimant would be forced to stay home with him until he calmed down, causing him to be tardy. On June 17, 2012, the claimant was involved in an auto accident and no longer had use of his vehicle. Approximately, two weeks later the claimant checked himself into a mental health facility for treatment. The claimant worked various night shifts, because he believed that was the only way to get more hours, but could have selected more regular day shifts, instead of coming in at all times of the night, which would have been less stressful for the claimant.

### **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:

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 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). The claimant was tardy on five occasions during the last rolling calendar year. While his incidents of tardiness exceeded the number allowed by the employer's policy, five incidents of tardiness in a 12-month period is not necessarily excessive. The claimant was without a vehicle since June 17, 2012, and was dealing with an ill son, which prevented him from always being to work on time. The last incident of tardiness occurred when the claimant's ride did not show up and he began walking to work before the employer called, learned of the situation, and kindly offered to pick him up. Excessive unexcused absenteeism, which includes tardiness, requires "an intentional disregard of the duty owed by the claimant to the employer..." 871 IAC 24.32(7). In this case, the administrative law judge finds the claimant did not show an intentional disregard of his duty

to the employer, but instead was quite aware and conscientious of his duty to the employer and was not tardy without good cause. Consequently, the administrative law judge must conclude the claimant's five incidents of tardiness do not rise to the level of excessive absenteeism as that term is defined by Iowa law. Therefore, benefits are allowed.

**DECISION:**

The August 30, 2012, reference 02, 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/kjw