

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

COLLIN D MADDY
Claimant

APPEAL NO. 07A-UI-01335-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LOMONT MOLDING INC
Employer

**OC: 12/24/06 R: 04
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge
Section 96.7-2-a(2) – Charges Against Employer’s Account
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

Collin D. Maddy (claimant) appealed a representative’s January 25, 2007 decision (reference 02) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Lomont Molding, Inc. (employer). After hearing notices were mailed to the parties’ last-known addresses of record, a telephone hearing was held on February 21, 2007. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Kathy Schimmelpfennig appeared on the employer’s behalf and presented testimony from one other witness, Cory Holt. The record was closed at 10:24 a.m. At 10:30 a.m., the claimant called the Appeals Bureau and requested that the record be reopened. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Should the hearing record be reopened? Was the claimant discharged for work-connected misconduct? Is the employer’s account subject to charge?

FINDINGS OF FACT:

The employer received the hearing notice prior to the February 21, 2007 hearing. The instructions inform the parties that if the party does not contact the Appeals Bureau and provide the phone number at which the party can be contacted for the hearing, the party will not be called for the hearing. The claimant contacted the Appeals Section was on February 21, 2007, 30 minutes after the scheduled start time for the hearing. He claimed that he previously had called the Appeals Bureau and provided his telephone number for the hearing. However, he did not have a control number, which the Appeals Bureau issues to each party who calls in for a hearing to verify that they have called. An entry of a call from the claimant does not appear in the call-in logbooks maintained by the Appeals Bureau. Neither did the claimant recall to whom he had spoken, nor had he been given the instructions routinely given to parties who call in as to what they should do if they do not get a call at the designated hearing time.

After a prior period of employment with the employer, the claimant most recently started working for the employer on October 3, 2006. He worked full-time as a machine operator on a 12:00 a.m. to 8:00 a.m., Monday through Friday schedule. His last day of work was January 2, 2007. The employer discharged him on January 3, 2007. The reason asserted for the discharge was excessive absenteeism.

Between October 3, 2006 and January 2, 2007, the claimant had nine absences. They were all properly reported as due to illness. The employer gave him a final warning for his absences on December 18, 2006. The employer did not express any question to the claimant as to any concern of the legitimacy of the claimant's reported illness and did not advise him that it would need medical documentation to substantiate any claimed illness. On January 3, 2007, he again properly called in and reported he would be absent due to illness. The employer had no information that the claimed illness was not valid. As a result of this absence after the prior final warning, the claimant was discharged.

The claimant established an unemployment insurance benefit year effective December 24, 2006.

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).

Iowa Code § 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(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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Absences 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 assess points or impose discipline up to or including discharge for the absence under its attendance policy. Cosper, supra. Because the final absence 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. 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.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began July 1, 2005 and ended June 30, 2006. The employer did not employ the claimant during this time and, therefore, the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

Because the issue is resolved on the merits in favor of the claimant despite his lack of participation in the hearing, the question as to whether the record should be reopened in order to provide him with an additional opportunity to participate is moot.

DECISION:

The representative's January 25, 2007 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. The employer's account is not subject to charge in the current benefit year.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css