

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SHAWN L CARPENTER**

Claimant

**APPEAL NO: 07A-UI-00041-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ACH FOOD COMPANY INC**

Employer

**OC: 03/12/06 R: 02  
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

Section 96.7-2-a(2) – Charges Against Employer's Account

**STATEMENT OF THE CASE:**

Shawn L. Carpenter (claimant) appealed a representative's December 19, 2006 decision (reference 02) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with ACH Food Company, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 18, 2007. The claimant participated in the hearing. William Nelson 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.

**ISSUES:**

Was the claimant discharged for work-connected misconduct? Is the employer's account subject to charge?

**FINDINGS OF FACT:**

The claimant started working for the employer on April 5, 2006. He worked full time as a line operator in the employer's Ankeny, Iowa plant. His last day of work was November 21, 2006. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism and progressive discipline.

The claimant had received a verbal warning on October 5, 2006 for a safety issue. He received a written warning on October 23 for calling in late for an absence on October 12; the claimant has a hearing impairment, and had previously called the guard shack to report absences. On October 12 when he called the guard shack by the time for calling in, he was told he could no longer call in to the guard shack, but had to use the employer's automated telephone system. He had difficulty in hearing the information in the automated system, so by the time he was able to successfully navigate through the automated system, his call in was late.

On November 15 the claimant was given an in-house suspension for failing to call in and reporting for work at 6:43 a.m. His scheduled start time was 5:00 a.m. His tardy that day was

due to forgetting to reset his alarm after having worked a different shift over the weekend. He was told that he would be discharged if there were additional incidents. On November 21 the claimant reported for work at 6:24 a.m. but had not called, resulting in his termination. The reason for his tardy and failure to call was that at approximately 2:00 a.m. his brother had come to his home and awaken him and immediately taken him to the hospital to be with their father who had been taken in earlier that night suffering from what had been believed to be a possible heart attack. However, it turned out to be something in the nature of a panic attack. The claimant was brought back home at approximately 3:45 a.m. He would have normally been getting up shortly to get ready for work, so did not go to bed but did sit down in a chair to await the time to leave for work. He fell asleep and did not awaken until 6:00 a.m., at which time he immediately drove to the work place.

The claimant established an unemployment insurance benefit year effective March 12, 2006. He filed an additional claim effective November 26, 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. 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). In this case, the employer asserts that the reason for the final tardy was not properly reported and therefore cannot be excused. However, it is clear that the claimant's failure to report his tardy as well as the tardy itself was not volitional, as both were due to an unforeseeable family medical emergency to which the claimant had no reasonable opportunity to communicate to the employer. While a tardy due to oversleeping might generally be presumed to be within the claimant's control, in this case the claimant has overcome that presumption; under the circumstances, the claimant could not have reasonably prevented his tardy or his failure to call in to report his tardy.

A determination as to whether an absence or a tardy is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Because the administrative law judge finds that the final tardy in this case was due to a reasonable ground, 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 October 1, 2004 and ended September 30, 2005. 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.

**DECISION:**

The representative's December 19, 2006 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.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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