

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JIMMY WHAYER
Claimant

APPEAL NO: 07A-UI-00308-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

**OC: 12/03/06 R: 02
Claimant: Respondent (1)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Tyson Fresh Meats, Inc. (employer) appealed a representative's December 28, 2006 decision (reference 01) that concluded Jimmy Whaler (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 25, 2007. The claimant participated in the hearing. Terry Carmichael, the employment manager, 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:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on September 12, 2005. At the time of hire, the claimant received an employee handbook. The handbook informed the claimant that if he accumulated 14 or more attendance points in a rolling calendar year, he would be discharged. The claimant understood he could be discharged if he accumulated 16 attendance points.

In March 2006, the claimant remembered his supervisor had talked to him about the attendance points he had accumulated. The claimant understood he had accumulated six points at that time. The claimant does not recall the employer giving him a written warning for accumulating 13.5 attendance points. The employer's records indicate the claimant received two written warnings for having 13.5 points - March 10 and April 20, 2006.

On October 31, the employer talked to the claimant about accumulating 14.5 attendance points. The employer deducted one point so the claimant could continue working. The claimant did not have any attendance issues again until November 24. The claimant's five-month old child was ill and the claimant was the only person available to take care of his daughter. The claimant called the employer on November 24 to report he was unable to work as scheduled. The

employer assessed the claimant one attendance point for this absence. The claimant also called to report he was unable to work on November 25 and 27. The employer assessed the claimant three points each of these days because the employer did not know the claimant had called to report these absences. The claimant tried to call the employer on Tuesday, November 28, but the answering machine would not let the claimant leave a message. The claimant did not leave a message on November 28 or 29 to let the employer know he was unable to work as scheduled. The claimant stayed home these days to take care of his ill child. When the claimant returned to work on November 30, the employer suspended him for excessive absenteeism.

After reviewing the claimant's attendance points, the employer discharged him on December 6, 2006. The claimant had accumulated 29.5 attendance points and violated the employer's attendance policy. After the claimant called on November 24, he had accumulated 14.5 attendance points. The employer would have discharged him for this absence. As a result of staying home to take care of his infant child, the claimant accumulated 29.5 attendance points as of November 30, 2006.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. 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 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).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The law presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7).

The employer established compelling business reasons for discharging the claimant. Pursuant to the employer's no-fault attendance policy, the claimant violated the policy by accumulating more than 14 attendance points in a rolling calendar year. Even though the claimant's personnel file indicates his supervisor gave him written warnings for attendance problems in March, April and October 2006, the claimant did not remember receiving any written warnings. The claimant acknowledged the employer talked to him about the points he had accumulated in March, but the claimant thought he only had six attendance points at that time. Without the claimant's supervisor present to testify or the person who gave the claimant warnings, the

claimant's testimony is credible and must be given more weight than the employer's reliance on unsupported hearsay information.

When the employer deducted one attendance point so the claimant would have a total of 13.5 instead of 14.5 the claimant should have realized his job was in jeopardy. The facts, however, establish that the claimant did not recognize that his continued employment was in jeopardy. The absences that resulted in the claimant's discharge do not constitute work-connected misconduct. With the exception of two days, the claimant properly notified the employer he was unable to work November 24 through 29. The claimant had justifiable reasons for not reporting to work these days. Therefore as of December 3, 2006, the claimant is qualified to receive unemployment insurance benefits.

DECISION:

The representative's December 28, 2006 decision (reference 01) is affirmed. The employer discharged the claimant for justifiable business reasons that do not constitute work-connected misconduct. As of December 3, 2006, the claimant is qualified to receive unemployment insurance benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs