

**BEFORE THE  
EMPLOYMENT APPEAL BOARD  
Lucas State Office Building  
Fourth floor  
Des Moines, Iowa 50319**

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**MICHAEL A TAPIA**

Claimant,

and

**IOC - DAVENPORT INC**

Employer.

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**HEARING NUMBER: 11B-UI-05602**

**EMPLOYMENT APPEAL BOARD  
DECISION**

**NOTICE**

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION: 96.5-2-A, 96.6-2**

**DECISION**

**UNEMPLOYMENT BENEFITS ARE DENIED**

The employer appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **AFFIRMS, in part, and REVERSES, in part,** as set forth below.

**FINDINGS OF FACT:**

The Claimant, Michael A. Tapia, worked for IOC – Davenport, Inc. from March 24, 2010 through February 16, 2011 as a part-time slot attendant. (Tr. 4-5) The employer has an attendance policy that operates on a point system. Employees “...can receive up to six points...[on the sixth point, an employee] will be terminated unless [that employee] brings in a doctors’ note...” (Tr. 5)

Mr. Tapia acquired an attendance point when he called off sick on June 6, 2010. (Tr. 5) The following week (June 13, 2010), he did not report to work due to family issues, which resulted in another point assessment. (Tr. 6) Mr. Tapia had an ongoing problem with tardiness that also increased his accumulation of points. (Tr. 6) He failed to attend a mandatory meeting; and on November 12<sup>th</sup>, he was tardy by 47 minutes. (Tr. 6)

By this point, the claimant had accumulated six attendance points for which the employer placed him on a 'final' progressive discipline. That warning put him on notice that if he accumulated one more point, he would be terminated. (Tr. 7) Mr. Tapia signed this warning in acknowledgment of receipt. (Tr. 7)

On February 13, 2011, the claimant was scheduled to work, but failed to report to work as he had to pick up his grandmother from Chicago. (Tr. 5, 9) Mr. Tapia was the only family member who could drive at that time. He informed the employer about his need to be absent that day several days prior, and even found his own replacement. (Tr. 9) However, just a couple of days prior, the replacement declined to cover him. Mr. Tapia knew "...[he] was definitely like on the border of ...disciplinary action..." but assumed that based on a conversation with his manager that his absence would be excused because of his positive reviews, hard work, etc. (Tr. 9) On February 16, the employer terminated him for excessive absenteeism. (Tr. 5)

The claimant filed a claim for unemployment benefits for which he was deemed eligible. The employer subsequently filed a timely appeal.

#### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code Section 96.5(2)(a) (2009) provides:

*Discharge for Misconduct.* If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

871 IAC 24.32(7) provides:

*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 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 substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

There is no dispute that Mr. Tapia exceeded the points allowable, which triggered his termination. The record establishes that he was aware of the employer's attendance policy (Exhibit 1), and by November 13<sup>th</sup>, 2010, he had accumulated six points. When he was absent yet again on February 13, 2011, he already knew his job was on the line based on that final progressive discipline he signed in acknowledgment of receipt on November 13, 2010. (Tr. 7) His understanding that his job was in jeopardy is further evidenced by his admission that he "...knew [he] was on the border of...disciplinary action..." that disciplinary action being termination as stated in his final warning. (Tr. 9)

Mr. Tapia's argument that his manager told him he would be okay based on his good work performance is not credible in light of the employer's point system. And while we note that exceeding the allotted number of points in a no-fault attendance policy is not dispositive of misconduct for the purposes of unemployment compensation cases, the Board does distinguish between excused and unexcused absences. The court in Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982) held that absences due to illness, which are properly reported, are excused and not misconduct. The claimant's final absence was due to personal reasons, and case law supports that absences for purely personal reasons, i.e., transportation, are unexcused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984); see also, Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984) By the claimant's own testimony, he knew in advance that his Grandmother needed transportation, he could have made other arrangements that would not have required his taking time off work.

Based on this record, we conclude that the employer satisfied their burden of proof.

**DECISION:**

The administrative law judge's decision dated May 20, 2011 is **AFFIRMED as to the timeliness issue**, and **REVERSED to the separation issue REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits provided he is otherwise eligible.

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Monique F. Kuester

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Elizabeth L. Seiser

AMG/kk