

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN W EAKINS
Claimant

APPEAL NO: 13A-UI-01270-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MILLARD REFRIGERATED SERVICES INC
Employer

**OC: 12/23/12
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Brian W. Eakins (claimant) appealed a representative's January 22, 2013 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Millard Refrigerated Services, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 28, 2013. The claimant participated in the hearing. Dena Larue appeared on the employer's behalf and presented testimony from one other witness, Tim Ash. 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:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on May 9, 2011. He worked full time, most recently as a lead assistant on the night conveyer line. His shift was to start at 3:30 p.m. and was to run until at least 12:30 a.m. His last day of work was the shift on the evening of November 10, 2012. The employer discharged him on November 14, 2012. The reason asserted for the discharge was excessive absenteeism.

The employer has a ten-point attendance policy of which the claimant was on notice. As of October 12, 2012 when the claimant was given a written final warning, he was at 8.5 points. Of those points, eight points were for eight full days of absence, and an additional half-point was for failing to call in on time to report one of the full days of absence. The eight days were due to one day of having no babysitter, one day of personal illness, four days of personal issues, and two additional days for unknown reasons.

After the October 12 final warning the claimant incurred an additional half-point on November 7 for leaving about three and a half hours early (with permission) because of an emergency with his daughter having surgery, bringing him to nine points, and another half-point on November 9 for being tardy for the start of his shift, bringing him to 9.5 points.

On November 10 the claimant was again tardy reporting for the start of his shift, clocking in at 3:39 p.m. The reason he was late was that he had discovered a problem with his tire and changed his tire before reporting for work. Also, later in the shift the claimant was involved in a workplace accident which nearly severely injured another employee; he was so shook up after the incident that he clocked out and left at about 8:39 p.m. He did not inform either of the other two leads working on the shift, nor did he inform the facility shift manager on duty, but only informed his subordinate who would on occasion substitute for the claimant when the claimant was not working. The employer concluded that either of these occurrences on November 10 would have pushed the claimant to the ten point attendance level; as a result, he was discharged on October 14.

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); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Excessive and unexcused absenteeism can constitute misconduct. 871 IAC 24.32(7). 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. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). 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). Absences and tardies due to issues that are of purely personal responsibility, specifically including such things as childcare issues and transportation issues, are not excusable. *Higgins*, supra; *Harlan v. Iowa Department of Job Service*, 350 N.W.2d 192 (Iowa 1984). Even if the claimant's shakiness after the workplace accident could be compared to an illness, his early departure for that reason was not properly reported, nor was an acceptable reason provided to excuse the failure to properly report the absence. Further, even if that incident was ignored, the claimant had already exceeded the ten-point level with his tardy earlier that morning, which was not for an excused reason.

The claimant had previously been warned that future occurrences could result in termination. *Higgins*, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's January 22, 2013 decision (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of January 22, 2013. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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