

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICAH K MOSS

Claimant

APPEAL NO: 12A-UI-00708-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OZARK AUTOMOTIVE DISTRIBUTORS INC

Employer

OC: 12/11/11

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

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

STATEMENT OF THE CASE:

Ozark Automotive Distributors, Inc. (employer) appealed a representative’s January 11, 2012 decision (reference 01) that concluded Micah K. Moss (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties’ last-known addresses of record, a telephone hearing was held on February 16, 2012. The claimant participated in the hearing. Whitney Smith-McIntosh 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?

OUTCOME:

Affirmed. Benefits allowed. Employer exempt from charge in current benefit year.

FINDINGS OF FACT:

The claimant started working for the employer on September 15, 2011. He worked full time as inbound material handler on a 4:00 p.m. to 1:00 a.m. schedule in the employer’s Des Moines, Iowa distribution center. His last day of work was December 13, 2011. The employer discharged him on December 14, 2011. The reason asserted for the discharge was excessive absenteeism.

During an employee’s first 90 days of employment, the employer’s policies provide for discharge for having two write-ups for attendance. The claimant had left work early (9:55 p.m.) on September 30 because his two-year-old child fell and broke her arm and the claimant needed to take her to the emergency room as his wife could not drive; on October 7 he had left work early (5:11 p.m.) because he was personally sick; and on October 10 he had clocked in one minute

late coming back from lunch. As a result, he was given a warning regarding his attendance on October 11, 2011.

On the evening of December 13 the claimant got a call from his wife indicating that their dog had become ill and that when the veterinarian was contacted, the veterinarian had instructed that the dog needed to be brought in right away. The claimant discussed the situation with his supervisor. The employer provided a second-hand statement that the supervisor had told the claimant that it was the claimant's decision to make, and that if he left they would deal with the consequences the next day; however, the claimant's first-hand testimony was that the supervisor had told him he could go ahead and leave, that he should not worry about leaving, and that if it was his dog in that situation, he would leave also. The claimant offered to return back to work after the visit to the veterinarian, but the supervisor told the claimant not to worry about returning after the visit. As a result, the claimant left at 7:05 p.m. but did not return when he could have at about 9:00 p.m. When he reported in for work on December 14, he was informed he was being discharged due to the attendance issues within his 90-day training period.

The claimant established an unemployment insurance benefit year effective December 11, 2011.

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).

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 and other reasonable emergency situations 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). Prior to December 13, the claimant did not have excessive unexcused attendance, as at the least both the September 30 and October 7 occurrences would be treated as excused. Further, assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the claimant's supervisor did approve and excuse the claimant for leaving work early on December 13, so that incident must be treated as excused for purposes of determining whether misconduct has occurred. (In order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of his job. *Cosper*, supra; *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). While the employer may have had a good business reason for discharging the claimant, it 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, 2010 and ended June 30, 2011. 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 January 11, 2012 decision (reference 01) is affirmed. 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/pjs