

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The employer is an employment agency. The claimant was first employed by the employer on March 31, 2005 as a welder assigned to Iowa Contract Fabricators in Kinseth, Iowa. The claimant worked at that assignment throughout his employment with the employer. He was discharged from that assignment on August 17, 2005 for poor attendance. The employer has a policy requiring that employees notify both the employer, Aerotek, Inc., and the assignee, in this case, Iowa Contract Fabricators, if that employee is going to be absent. The claimant was absent on August 15, 16, and 17, 2005 because his eldest daughter was in the hospital for diabetes. The claimant notified Iowa Contract Fabricators but did not always notify the employer. For an earlier absence the claimant had called the employer's recruiter, Nick Trotter, to inform him of an absence and Mr. Trotter told the claimant that the claimant did not need to call him every time he was going to be absent for personal illness or for the illness of his children. In addition to these absences the claimant had other attendance violations on July 28, 2005, July 11, 2005, June 27, 2005, June 1, 2005; May 31, 2005; May 11 and 12, 2005; and April 27, 2005. Neither the employer's witness, Amanda Rice, Customer Service Associate nor the claimant knew or remembered whether these violations were absences or tardies or occasions when the claimant left work early. All or almost all were due to the illness of the claimant's children in particular his eldest daughter who has diabetes. The claimant always called Iowa Contract Fabricators but did not always call the employer because of the statements from Mr. Trotter as noted above. The claimant had just obtained custody of his children in May of 2005 and had to look out after their care and health. The claimant received no warnings from the employer about his attendance and only one oral warning from Iowa Contract Fabricators in August of 2005 about his attendance. Pursuant to his claim for unemployment insurance benefits filed effective August 28, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,000.00 as follows: \$125.00 per week for eight weeks from benefit week ending September 3, 2005 to benefit week ending October 22, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

Iowa Code section 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.

The parties agree, and the administrative law judge concludes, that the claimant was discharged on August 17, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including, excessive unexcused absenteeism. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism. At the outset, the administrative law judge notes that neither witness was particularly credible. The claimant was equivocal in his responses and inconsistent. The employer's witness, Amanda Rice, Customer Service Associate, testified only from the employer's records and the employer's records were sketchy at best. She could not testify as to whether the attendance violations were absences or tardies or occasions when the claimant left work early nor could she testify as to the reasons for the violations nor could she testify as to whether the assignee, Iowa Contract Fabricators, had been notified of the attendance violations by the claimant. Ms. Rice testified that the claimant did not notify the employer, Aerotek, Inc., but her testimony here was hearsay. The claimant testified that he had notified Nick Trotter, the recruiter for the employer of at least some of his

absences and was told by Mr. Trotter that he did not have to notify Mr. Trotter of every absence. The claimant testified that he notified the assignee, Iowa Contract Fabricators. In the absence of any evidence to the contrary, the administrative law judge is constrained to conclude that all of the claimant's attendance violations whether they were absences, tardies, or occasions when the claimant left work early, were properly reported to the employer and Iowa Contract Fabricators.

The next issue is whether the claimant's attendance violations, whether they were absences, tardies, or occasions when he left work early, were for personal illness or reasonable cause. The claimant testified that most, if not all, of his attendance violations were due to illnesses of his children, in particular his eldest daughter, who has diabetes. The employer had no evidence to the contrary. The administrative law judge is constrained to conclude, in the absence of any evidence to the contrary, that the claimant's attendance violations, whether absences, tardies, or occasions when he left work early, were due to the illness of his children and in particular his eldest daughter who has diabetes and therefore he had reasonable cause for his attendance violations. It is true that the claimant had 11 attendance violations in less than four months. This seems excessive to the administrative law judge. However, the employer, Aerotek, Inc., gave the claimant no warnings and there is only evidence of one verbal warning from the assignee, Iowa Contract Fabricators. Because of the paucity of warnings and the absence of specificity in the claimant's attendance violations, the administrative law judge gives the claimant the benefit of the doubt.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant's attendance violations, whether they were absences, tardies, or occasions when the claimant left work early, were for reasonable cause or personal illness and properly reported and not excessive unexcused absenteeism. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant the denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature, including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,000.00 since separating from the employer herein on or about August 17, 2005 and filing for such benefits effective August 28, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of September 29, 2005, reference 01, is affirmed. The claimant, Jerry L. Colby, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision the claimant has not been overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

kkf/kjw