

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WESLEY RETTIG

Claimant

APPEAL NO: 13A-UI-01282-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

LANCE PRIVATE BRANDS LLC

Employer

OC: 02/19/12

Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the January 29, 2013, reference 03, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 5, 2013. The claimant participated in the hearing. Stephanie Zimmerman, Human Resources Generalist, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time machine technician II for Lance Private Brands from April 6, 2010 to December 26, 2012. He was discharged from employment due to a final incident of absenteeism that occurred on December 21, 2012.

The employer uses a point-based, no-fault, rolling 12-month attendance policy and employees are discharged upon reaching eight points. If an employee is absent a full day he receives one point. If he leaves early before working at least half his shift he receives one point. If he works a partial day of more than half his shift he receives one-half point. An incident of tardiness is assessed one-half point.

On January 16, 2012, the claimant was absent due to properly reported illness and received one point; on January 20, 2012, he worked a partial day and received one-half point; on January 21, 2012, he was tardy and received one-half point; on June 9, 2012, he worked a partial day and received one-half point; on July 3, 2012, he was absent due to properly reported illness and received one point; on July 17, 2012, he worked a partial day and received one-half point; on August 2, 2012, he left early and received one point; on August 7, 2012, he worked a partial day and received one-half point; on August 16, 2012, he worked a partial day and

received one-half point; on August 29, 2012, the claimant was tardy and received one-half point; and on September 13, 2012, the claimant left early and received one point.

The claimant received a verbal warning regarding his attendance March 28, 2012, when he reached four points; a verbal warning regarding his attendance July 2, 2012, after a point dropped off and he reached three points; a written warning regarding his attendance August 2, 2012, when he reached five points; a second written warning regarding his attendance August 16, 2012, when he reached six points; and a final written warning regarding his attendance September 14, 2012, when he reached seven and one-half points.

On April 16, 2012, Mike Vandenburg was hired and became the claimant's supervisor. The claimant testified that his attendance problems began in earnest July 17, 2012, when he started going home approximately once a week because he felt mistreated by Mr. Vandenburg. He testified Mr. Vandenburg told him not to touch any other employee's machine and to be cooperative with co-workers but then forced him to run machines he was not trained for or qualified to run when other employees were on break. He was the only employee in his department required to cover all of the breaks even though Mr. Vandenburg told him not to touch any other machines. If the claimant made an error while running a different machine he was heavily criticized, ridiculed or warned. Mr. Vandenburg also told him he was on probation even though that disciplinary action did not go through human resources and the employer does not use probation except for new employees. In October 2012 a co-worker started an argument with the claimant and threatened him. The claimant reported the situation to Mr. Vandenburg and he talked to the other employee and that employee returned to the claimant's machine and pushed him into the machine. The other employee was discharged and the claimant was suspended the following night because "all parties involved were to be disciplined." Mr. Vandenburg issued three written warnings to the claimant about rules "he made up" and that were not included in the employee handbook. When the claimant complained about it Mr. Vandenburg said it was his line and he could make any rules he wanted. On September 13, 2012, the claimant went home early after the line was down for four hours and Mr. Vandenburg said someone had to take the blame and stated it was the claimant's fault. The claimant went to human resources twice and after his second complaint a meeting was held in September 2012 with all parties and the work environment, as well as the claimant's attendance, improved for approximately three months.

The claimant disputes his full attendance points September 13 and December 21, 2012, because although he left early, he was working 12-hour days and worked at least six hours both days but rather than receiving one-half point he was assessed a full point on each date. Consequently, he believed he had seven attendance points when he worked a partial day before leaving December 21, 2012. The claimant tried to explain the situation to human resources at the time of his termination from employment and was told he had been warned too many times and been in the human resources manager's office too often.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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(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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The claimant received two verbal warnings in writing and three written warnings about his attendance between March 28 and September 13, 2012. Usually attendance cases involve missed days and/or tardiness. In this case, however, all but one of the claimant's absences after July 17, 2012, were due to his working a partial day or leaving early due to his treatment by Mr. Vandenburg. The claimant was singled out by Mr. Vandenburg for harsh treatment, warned for issues Mr. Vandenburg decided were violations of his personal rules but were not listed in the employee handbook, was suspended after another employee picked a fight with him even though the claimant walked away and reported the incident to Mr. Vandenburg, was told not to touch any other machines but then told to cover all other employees' machines when they were on break or lunch even though he was not qualified or trained to run those machines, and generally could not satisfy Mr. Vandenburg, regardless of what he did. The claimant worked a partial day or left early rather than engage in arguments with Mr. Vandenburg, as that was what he was instructed to do in orientation. The claimant did go to human resources for help with the situation and while Mr. Vandenburg's behavior toward the claimant improved between September and December 2012 after the second meeting with human resources but deteriorated again in December 2012. The claimant was also assessed one full point September 14 and December 21, 2012, for leaving early but because the claimant was working 12-hour shifts and worked at least six hours, he should only have received one-half point for each absence. That error gave the claimant one additional point so instead of having seven and one-half points when he worked a partial day December 21, 2012, he was told he had eight and one-half points and his employment was terminated effective December 26, 2012. Consequently, the claimant did not exceed the allowed number of attendance points and should not have faced termination of his employment due to his attendance. While the administrative law judge does not wish to reward the claimant for working partial days or leaving early due to his treatment by Mr. Vandenburg because generally an employee needs to stay at work and attempt to deal with the situation, in this case he was instructed to go home rather than have an argument with a supervisor or co-worker during orientation and he did seek the assistance of human resources in trying to deal with his problems with Mr. Vandenburg. Although their relationship improved immediately following the employer's second meeting with human resources, Mr. Vandenburg reverted to his previous behavior December 21, 2012, which caused the claimant to work a partial day expecting to receive one-half point in which case he

would not have lost his job if he had been assessed the correct point totals for September 13 and December 21, 2012. Under these circumstances, the administrative law judge must conclude the claimant's absences were attributable to his unfair treatment by Mr. Vandenburg and the incorrect tally of his attendance points. Therefore, benefits must be allowed.

DECISION:

The January 29, 2013, reference 03, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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