IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

MICHAEL BEGNOCHE
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LEMARS IA 51031

WELLS DAIRY INC
PO BOX 1310
LEMARS IA 51031-1310

Appeal Number: 04A-UI-08377-RT
OC: 07/04/04 R: 01
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Michael Begnoche, filed a timely appeal from an unemployment insurance decision dated July 27, 2004, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on August 24, 2004, with the claimant participating. Jennifer Oldenkamp, Human Resources Associate, participated in the hearing for the employer. Employer's Exhibit One and Two were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer as a full-time freezer employee from February 1, 1999 until he was discharged on June 9, 2004. The claimant was discharged by a letter dated June 9, 2004, which he received on or about June 14, 2004. The claimant was discharged for poor attendance. On May 2, 2004, the claimant was absent for personal illness and this was properly reported. The employer has a rule or policy that requires that an employee notify the employer of an anticipated absence before the end of the last day worked and if not sooner, before the start of the shift for the day the employee intends to be absent. This policy appears at Employer's Exhibit One and the claimant received a copy and signed an acknowledgement. The claimant did properly notify the employer of his absence on May 2, 2004. Beginning in March 2004, the claimant had significant personal problems causing the claimant serious depression and his absences were related to this depression. On April 22, 2004, the claimant was tardy two hours and thirty-one minutes. This was a prescheduled tardy, but for the anticipated purpose of attending a workers' compensation appointment at a medical clinic in Sioux City, Iowa. However, the claimant did not go to that appointment because of his depression but rather attended an appointment with his mental health therapist. The claimant had properly reported this tardy in advance and it was approved by his supervisor. The claimant missed three other workers' compensation appointments, but these did not cause the claimant to be absent or tardy because he went to work instead. On March 21, 2004 and March 7, 2004, the claimant was also absent for the same depression condition and both absences were properly reported. On March 2, 2004, the claimant was tardy three hours and thirty-three minutes and this was properly reported to the employer. The claimant was tardy because he met with his mental health therapist for the first time. The claimant was absent on December 23, 2003 after showing up for work but having to go home because of illness. This was properly reported to the employer. On October 17, 2003, the claimant was tardy 57 minutes because he overslept but this was properly reported to the employer. The claimant received three oral warnings and a written warning for his attendance as shown at Employer's Exhibit Two, the most recent warning being an oral warning on October 27, 2003.

Because of the claimant's serious depression condition, the claimant applied for time off to attend treatment and this was approved by the employer. The claimant had applied for family medical leave from May 22, 2004 through June 21, 2004 and believed that it was going to be approved by the employer because the employer had approved the claimant being gone for treatment. The employer ultimately did not approve the FMLA leave, but rather discharged the claimant by letter dated June 9, 2004. At all material times hereto, the employer was aware of the claimant's depression condition.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was 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, (7) provide:

> 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).

> (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 June 9, 2004 by a letter of that date. 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 the 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. 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. Most of the facts are really not in dispute. The claimant had some absences for a depression condition as shown in the Findings of Fact on May 2, 2004; March 21, 2004; March 7, 2004. These absences were properly reported to the employer. The claimant credibly testified that he was having some serious personal problems causing the serious depression and that these absences were related to that condition. The employer's witness, Jennifer Oldenkamp, Human Resources Associate, agreed that the claimant had properly reported these absences. The

claimant was also absent on December 23, 2003 for personal illness when he went to work, but had to leave work because of an illness and this was properly reported. The claimant was also tardy on March 2, 2004 because of a first appointment with his mental health therapist and this tardy was properly reported. The claimant was also tardy on April 22, 2004 when he went to an appointment with his mental health therapist. The claimant had an appointment to see his workers' compensation clinic in Sioux City, Iowa, but missed that appointment in order to go to see his therapist. The evidence indicates that the claimant's tardy was prescheduled and that after his appointment he informed his supervisor that he had gone to see his therapist and this tardy was approved by the employer. Accordingly, the administrative law judge concludes that all of the claimant's absences and tardies as noted above were for personal illness and properly reported and were not excessive unexcused absenteeism. The claimant did have a tardy on October 17, 2003 because he overslept, but this was properly reported. Generally, three unexcused absences or tardies are required to establish excessive unexcused absenteeism. See Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). Here, the claimant had only one such tardy, October 17, 2003. The claimant did receive three oral warnings in 2003 as shown at Employer's Exhibit Two and a written warning in 2000. The administrative law judge believes that the written warning is to remote in time to be relevant here. The administrative law judge notes further that the claimant received no warnings in 2004. The administrative law judge notes that the claimant's depression condition was serious enough that the employer had initially approved treatment and the claimant had applied for FMLA leave from May 22, 2004 to June 21, 2004 and it was during this period of time that the claimant was discharged.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant's absences and tardies were not excessive unexcused absenteeism and disqualifying misconduct and, therefore, the claimant 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 a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. 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.

DECISION:

The representative's decision dated July 27, 2004, reference 01, is reversed. The claimant, Michael Begnoche, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct.

kjf/kjf