IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOSE L SALINAS
Claimant

WELLS ENTERPRISES INC
Employer

APPEAL NO: 14A-UI-10580-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/07/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Wells Enterprises, Inc. (employer) appealed a representative's September 29, 2014 decision (reference 01) that concluded Jose L. Salinas (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 October 30, 2014. A review of the Appeals Section's conference call system indicates that the claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Cheryl Rodermund of Equifax/TALX Employer Services appeared on the employer's behalf and presented testimony from one other witness, Doug Carter. Based on the evidence, the arguments of the employer, 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?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on December 2, 2013. He worked full time, most recently as a freezer track specialist on an overnight shift from about 5:55 p.m. to about 4:30 a.m. On or about October 1, 2013 the claimant's employer became WEI Sales, L.L.C., a related entity. The administrative law judge notes that there was another representative's decision issued on October 10, 2014 (reference 04), naming WEI Sales, L.L.C. as the claimant's employer, using a separation date of September 9, 2014, which also found the claimant's separation to not be disqualifying, and that the employer did not appeal that representative's decision.

The claimant's last day of work was the shift from the evening of September 9, to go into the morning of September 10, 2014. The employer discharged him on September 9. The reason asserted for the discharge was excessive absenteeism.

The employer has a ten-point attendance program. The employer asserted that the final occurrence was a late or missing punch on the shift of the evening of September 5 for which he was assessed a half point, taking him to eleven points. He had been given a final written warning on July 28, 2014 advising him that he was over nine points.

The employer indicated that of the eleven points, about four points were for missed punches. The remainder, about seven points, were for absences, but for which the employer could not provide reasons.

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. Rule 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Excessive unexcused absenteeism can constitute misconduct. Rule 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. Rule 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). Even if the final occurrence was not related to properly reported illness or other reasonable grounds, and even if the claimant had accumulated excessive attendance points, the employer has not established

that the claimant had excessive unexcused occurrences. While an employer might chose to implement a "no fault" attendance policy, this does not relieve it of its burden of establishing that the attendance occurrences are in fact unexcused for purposes of determining misconduct in unemployment insurance proceedings. The employer 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.

DECISION:

The representative's September 29, 2014 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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