

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN S MILLER
Claimant

APPEAL NO: 12A-UI-11975-D

**ADMINISTRATIVE LAW JUDGE
DECISION**

JACOBSON STAFFNG COMPANY LC
Employer

OC: 09/09/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

John S. Miller (clamant) appealed a representative's October 4, 2012 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Jacobson Staffing Company, L.C. (employer) After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on December 5, 2012. The claimant participated in the hearing. Mike Dubberke 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.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The employer is a temporary employment firm. After a prior period of employment with the employer, the claimant most recently began an assignment through the employer on May 2, 2012. He worked full time as a warehouse worker at the employer's business client. His last day on the assignment was September 11, 2012. The assignment ended because the employer determined to end it on September 12, 2012. The reason asserted for the discharge was excessive absenteeism.

In making its decision, the employer considered that the claimant had the following unexcused absences:

Date	Occurrence/reason if any
06/13/12	Absence, sick.
07/02/12	Absence, sick.
07/03/12	Absence, sick.
07/05/12	Absence, sick.
07/06/12	Absence, sick.
09/12/12	Absence, transportation.

The July absences were covered by a doctor's note dated July 5.

The final absence on September 12 was due to the claimant's car's water pump going out on him as he prepared to go to work that morning.

The only warning the employer gave to the claimant was a verbal warning on July 9, 2012; however, it is not clear that the claimant understood from that warning that he would be discharged if he had a further absence.

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). The gravity of the incident and the number of prior violations and prior warnings are factors

considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

Excessive 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 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). Absences due to issues that are of purely personal responsibility, specifically including transportation issues, are not excusable. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984); *Harlan v. Iowa Department of Job Service*, 350 N.W.2d 192 (Iowa 1984). While the final absence may not have been excused, the prior absences were related to properly reported illness or other reasonable grounds. Therefore, the employer has failed to establish excessive unexcused absenteeism necessary to establish work-connected misconduct, and no disqualification is imposed. Further, the claimant had not previously been effectively warned that a future absence could result in termination. *Higgins*, supra. 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 October 4, 2012 decision (reference 01) is reversed. 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs