IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHRISTOPHER Y COURTNEY
Claimant

KESTERSON ENTERPRISES INC
Employer

APPEAL NO: 09A-UI-11026-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/21/09
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Christopher Y. Courtney (claimant)) appealed a representative's July 23, 2009 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Kesterson Enterprises, Inc. (employer. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 18, 2009. The claimant participated in the hearing. Bob Kesterson 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?

FINDINGS OF FACT:

The claimant started working for the employer on or about August 10, 2008. He worked full time as a sandwich artist at the employer's sandwich shop. His last day of work was June 22, 2009. The employer discharged him on June 23, 2009. The reason asserted for the discharge was attendance.

The claimant had been absent on September 7 and September 13, 2008; at least the absence September 13 was due to being in jail. The employer warned the claimant on these absences on September 16. On December 26, the claimant was ordered confined in jail for 90 days on an OWI conviction, but the court allowed the claimant to continue working so long as he had outside transportation to and from work, so the employer provided the transportation to and from the jail during that period. During that period there were several discussions on how the employer was counting on the claimant not to let the employer down. After the completion of the jail term, the employer sometimes still provided the claimant with transportation, sometimes the claimant's daughter drove him, and sometimes he would walk the approximately six miles to work. Although when he walked he was sometimes late, he generally would advise the employer he was walking, and the employer chose to allow the claimant to arrive late so long as he did call and did come in, rather than take disciplinary action against him.

On June 23 the claimant was scheduled for work from 8:30 a.m. to 5:30 p.m., but was a no-call/no-show for work. He had gotten sick with diarrhea and vomiting. He had attempted to call but his home phone was not working. He did not feel well enough to attempt to leave his house to try to use another phone elsewhere. That evening a friend stopped by the claimant's house to check on him. The claimant borrowed the friend's cell phone and called Mr. Kesterson, the owner/operator. He apologized for being absent and attempted to explain that he was sick and that his phone had not worked. Mr. Kesterson suspected that the illness was self-induced, due to alcohol consumption, and that the claimant had simply shown he was irresponsible after being given many breaks by the employer; as a result, he told the claimant that he was discharged.

The claimant denied that the illness was other than bona fide, not self-induced illness. On June 24 a repairperson from the telephone company came to the claimant's home and indicated that it appeared that the claimant's phone line had been hit by lightening. The claimant did not provide information on that report to the employer as he understood he was already discharged.

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).

Excessive unexcused absences can constitute misconduct. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984); 871 IAC 24.32(7). 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. Cosper, supra; Gaborit v. Employment Appeal Board,

734 N.W.2d 554 (Iowa App. 2007). In this case, the employer correctly asserts that the reason for the final absence was not properly reported. However, it is clear that the claimant's failure to report his absence was not volitional, as he has sufficiently established that his phone was unexpectedly not working due to a lightning strike, and that he was sufficiently unwell to make it imprudent for him to attempt to leave his home to seek out another phone. To the extent the employer concluded that the claimant's illness was not bona fide, the employer based that conclusion on nothing more than suspicion, insufficient to carry the burden to prove that the absence was for an unexcused reason. 871 IAC 24.32(4). Because the final absence was related to an illness or other reasonable grounds, and there was an excusable reason for failing to properly report the absence, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. 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 July 23, 2009 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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