

from March 9, 1999 until July 5, 2005, when Plant Engineer Roger Bailey discharged him for excessive unexcused absences. There was no other basis for the discharge. The final absence occurred on June 30, 2005, when Mr. Sturtevant was tardy to work. Mr. Sturtevant was tardy because his son was in trouble with law enforcement and Mr. Sturtevant needed to collect his son from the police station. Mr. Sturtevant worked the balance of his shift on June 30, 2005, but was sent home on July 1, pending a review of his attendance history.

The employer has a written attendance policy. The policy is reviewed with employees at the time of hire and posted in the hallway of the workplace. Under the policy, an employee who needs to be absent from work is expected to notify the employer at least 30 minutes prior to the scheduled start of the shift to be missed. The employer prefers that the employee call the designated telephone number and leave a message, but allows employees to contact their supervisors directly if the employee knows the telephone number. Under the employer's attendance policy, the employer tracks the employee's attendance for a rolling 12-month period.

Mr. Sturtevant's prior absences within the final year of employment for reasons other than illness properly reported to the employer were as follows. Mr. Sturtevant was tardy for matters of personal responsibility on the following dates: September 19, October 14, January 13, February 3, 8, and 27, April 24, May 1, and June 25. The incidents of tardiness ranged from 15 minutes to two hours.

Pursuant to the employer's point system, Mr. Sturtevant received two warnings on October 3, 2004 that he had reached 8.5 points and 10.0 points. Receiving a total of 14 points subjected Mr. Sturtevant to possible discharge.

Mr. Sturtevant established a claim for benefits that was effective September 4, 2005 and has received \$1,944.00 in benefits. \$520.00 of the total benefits credited to Mr. Sturtevant were offset against Mr. Sturtevant's previous obligation to Iowa Workforce Development for benefits previously received.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Sturtevant was discharged for misconduct in connection with the employment based on excessive unexcused absences.

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.

Because the claimant was discharged, the employer bears the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for Mr. Sturtevant's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the evidence must establish that his unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence indicates that Mr. Sturtevant's tardiness on June 30, 2005 was an unexcused absence. The evidence in the record indicates that Mr. Sturtevant had been tardy to work for matters of personal responsibility ten times between September 19, 2004 and his discharge. Mr. Sturtevant's tardiness subsequent to October 3, 2004, must be considered in light of the two warnings Mr. Sturtevant received on that date. Mr. Sturtevant was tardy 11 days after receiving the two warnings regarding attendance and continued to be tardy another nine times after being warned that he accruing significant attendance points that placed his employment in jeopardy. The last two instances of tardiness occurred five days apart. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Sturtevant's unexcused absences were excessive and that he was discharged for misconduct in connection with the employment. Accordingly, Mr. Sturtevant is disqualified for benefits.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The \$1,944.00 in benefits Mr. Sturtevant has received constitute an overpayment that Mr. Sturtevant will have to repay.

DECISION:

The representative's decision dated September 23, 2005, reference 01, is reversed. The claimant was discharged for misconduct. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefits amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to the claimant. The claimant is overpaid \$1,944.00.

jt/s