

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CODY ANDERSON

Claimant

APPEAL NO. 10A-UI-10838-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

HORMEL FOODS CORPORATION

Employer

OC: 06-27-10

Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 27, 2010, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 23, 2010. The claimant participated in the hearing. Todd Yocum, Plant Superintendent; Erin Montgomery, Plant Controller; and Troy Hawkshead, Plant Manager; participated in the hearing on behalf of the employer. Employer's Exhibits One through Eight were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time mixer operator for Hormel Foods from September 25, 2006 to June 28, 2010. The employer's attendance policy states that if an employee accumulates three occurrences during a five-month period, disciplinary action will result. On June 2, 2009, the claimant received a last-chance verbal warning for his attendance. He had received previous disciplinary action regarding his attendance; but, because he went one year without any attendance-related disciplinary action until absences January 8 and 9, 2009, when he was absent due to illness with a doctor's excuse which counted as one occurrence, May 8 and June 2, 2009, the employer decided to issue the last-chance verbal warning to the claimant (Employer's Exhibit Eight). On July 20, 2009, he received a verbal warning for being tardy April 15, July 17, and July 20, 2009 (Employer's Exhibit Seven). On August 13, 2009, the claimant received a written warning for incidents of tardiness May 8, June 2, and August 13, 2009 (Employer's Exhibit Six). On August 29, 2009, the claimant received his first active strike for being absent August 29, 2010, in combination with his absences June 2 and August 13, 2009, during the last five months (Employer's Exhibit Five). On March 26, 2010, the claimant received a written warning for being tardy January 27, March 11, and March 26, 2010 (Employer's Exhibit Four). On April 13, 2010, the claimant received his second active strike for being absent April 13, 2010, in combination with his absences due to illness without a doctor's

excuse January 25 and 26, 2010, that occurred during the previous five months (Employer's Exhibit Three). On June 28, 2010, the claimant received his first active strike for tardiness for being 3.06 hours tardy June 22, 2010, in combination with his incidents of tardiness March 11 and March 26, 2010, that occurred during the previous five months (Employer's Exhibit Two). Because the claimant had two active strikes in play at the time of the issuance of the first strike for tardiness, his employment was terminated effective June 28, 2010 (Employer's Exhibit Two). The claimant's last incident of tardiness occurred because his vehicle would not start when he went out to go to work June 22, 2010. He called his father and asked him to bring parts so he could fix the alternator rather than asking his dad for a ride to work as quickly as possible knowing that he was on his second strike and that his job was in jeopardy and he could fix his vehicle after work.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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.

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The claimant was absent a total of eight times between June 2, 2009 and April 13, 2010, and was tardy on four occasions between January 27 and June 22, 2010. Three of his eight absences were due to properly reported illness, meaning he was effectively absent five times and tardy four. The claimant received seven warnings about his attendance between June 2, 2009 and June 22, 2010. He knew his job was in jeopardy because he had two active strikes. Despite that knowledge, however, he chose to spend three hours waiting for parts to make a ten-minute repair on his vehicle rather than securing a ride to work from his father as quickly as possible and working on his vehicle when he returned home from work. While the claimant declared

“late is late,” the employer testified it has discretion in making disciplinary and termination decisions and if the claimant had gone to work as soon as possible and explained the circumstances of his tardiness, the employer might have allowed him to keep his job. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and that the final absence was not excused. The final absence, in combination with the claimant’s history of absenteeism, is considered excessive. Therefore, benefits must be denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant’s employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The July 27, 2010, reference 01, decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw