IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RAYMOND DYDELL Claimant	**APPEAL NO: 14A-UI-01560-D**
	ADMINISTRATIVE LAW JUDGE DECISION
PROGRESS INDUSTRIES Employer	
	OC: 01/19/14 **Claimant: Appellant (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Raymond Dydell (claimant) appealed a representative's February 11, 2014 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Progress Industries (employer). After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on March 12, 2014. The claimant participated in the hearing. Kelly Decker appeared on the employer's behalf. During the hearing, Employer's Exhibits One through Seven and Claimant's Exhibits A, B, and C were entered into evidence. 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 July 31, 2002. He worked full time as an ICFD instructor at one of the employer's group homes providing services to persons with disabilities. He worked a 6:00 a.m. to 2:00 p.m. shift with Wednesdays off, and working every other weekend. His last day of work was January 14, 2014. The employer discharged him on January 16, 2014. The reason asserted for the discharge was violation of the employer's attendance policy through excessive tardiness.

The claimant was an hour and a half late on July 18 due to family issues; he was given a first reminder coaching. He was two hours late on July 26 due to family issues; he was given a second reminder coaching. On September 1 he was a half-hour late due to oversleeping, and was given another second reminder coaching. On September 30 he was an hour late due to oversleeping, and was given a documented verbal counseling on October 1. On October 1 he was also 20 minutes late due to not being able to find his keys sooner; he was also given a written counseling on October 1 for that occurrence. On December 19 the claimant was an hour and 15 minutes late due to family issues; he was given a written probation. The two October 1

disciplines as well as the December 19 discipline all indicated that the consequence of further violations was "further discipline up to and including termination."

On January 16 the claimant awoke over two hours late; there had been a power failure, and his alarm had not gone off. He called Decker, the vice president for human resources, and informed her of the situation. She had in come in for a discussion, but then did discharge him due to the additional occurrence after the December 19 probation.

The claimant asserts that the employer should not have discharged him for the January 16 occurrence because the employer skipped a step of giving him a probation before giving him the probation; he argues he should have been given a suspension, not a probation, for the December 19 incident, and that the January 16 incident then should have resulted in a probation, not a discharge.

The employer's bargaining agreement indicates that the employer can discipline employees "by two (2) verbal reminders, verbal warnings, written reprimand, suspension or discharge . . . Progressive discipline will be used except in cases of serious offenses . . . Letters of suspension or probation shall not be considered after two (2) years if there are no further violations."

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); Iowa Code § 96.5-2-a.

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 and unexcused absenteeism can constitute misconduct. 871 IAC 24.32(7). Determination of what constitutes misconduct is not defined by the content of a contract of hire or a bargaining agreement. *Hurtado v. IDJS*, 393 N.W.2d 309 (Iowa 1986). Regardless, the administrative law judge's reading of the bargaining agreement is that the employer's interpretation that a suspension or probation can be in the alternative, not necessarily separate steps, is reasonable. Tardies are treated as absences for purposes of unemployment insurance law. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Occurrences

due to issues that are of purely personal responsibility are not excusable. *Higgins*, supra; *Harlan v. Iowa Department of Job Service*, 350 N.W.2d 192 (Iowa 1984). The presumption is that oversleeping is generally within an employee's control. *Higgins*, supra. The claimant's final tardy was not excused and was not due to illness or other excusable grounds. Regardless of the claimant's disagreement with the employer's interpretation of the application of a probation, he had previously been warned that future violations could result in termination and knew that his job was in jeopardy. *Higgins*, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's February 11, 2014 decision (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of January 16, 2014. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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