IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CAMERON G MACAW Claimant **REM IOWA COMMUNITY SERVICES INC** Employer	**APPEAL NO: 13A-UI-02786-DT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/27/13** **Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

REM Iowa Community Services, Inc. (employer) appealed a representative's February 26, 2013 decision (reference 01) that concluded Cameron G. Macaw (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 4, 2013. The claimant participated in the hearing. Danielle Smith 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:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on April 12, 2012. He worked full time as a direct support staff person at the employer's client residence for persons with mental or physical disabilities. His last day of work was January 27, 2013. The employer discharged him on that date. The reason asserted for the discharge was his attendance.

On December 31, 2012 the employer gave the claimant a final warning for attendance because of six full day absences and about 17 tardies. All six absences were due to health issues; the employer asserted that the absence on December 26 was not properly reported because the claimant did not call in at least four hours period to the start of the shift. However, the claimant had not called that far in advance as he did not realize that he was too ill to report for work until he awoke shortly before the time he would have needed to leave for work and observed that he was swollen and ill. Also, the majority of the tardies were due to times the claimant had been reporting for work after attending class; his supervisor had agreed to allow the claimant to be

late on those days, as well as an instance where the claimant agreed to fill in on a shift for another employee but required a supervisor to come and get him as he had no transportation on that day. The warning did not specify what future circumstances would result in termination, only that termination would occur if the claimant did "not address the attendance concerns."

After receiving the final warning the claimant was tardy on January 12 due to having a flat tire, on January 19 due to his car not starting, and finally on January 21 due to the car's battery again dying. When the employer discharged the claimant on January 28, the employer's focus was on the tardy which occurred on January 12.

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 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). In this case the employer 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 before the start of his shift was not volitional, as he could not have known he would be ill until shortly before his shift. Absences due to issues that are of purely personal responsibility, including car problems, 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). Tardies are treated as absences for purposes of unemployment insurance law. *Higgins*, supra. In order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of his job. *Cosper*, supra; *Higgins*, supra.

While the claimant's final tardies might not be considered excused because of being due to personal responsibility as to having reliable transportation, the employer has not established that prior to the January tardies that the claimant's absenteeism and tardiness was unexcused under unemployment insurance standards. The three January tardies approach but under the circumstances of this case do not amount to excessive unexcused tardiness. The administrative law judge further notes that under the vague language of the final warning the claimant could not determine what level of reoccurrence would result in termination. 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 February 26, 2013 decision (reference 01) is affirmed. 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/css