

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

TRACEY NORING
Claimant

WIESE INDUSTRIES INC
Employer

APPEAL NO. 14A-UI-04633-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 07/14/13
Claimant: Respondent (1)**

Iowa Code § 96.5-2-a - Discharge for Misconduct
871 IAC 24.32(7) - Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

Wiese Industries, Inc. (employer) appealed an unemployment insurance decision dated April 29, 2014, (reference 01), which held that Tracey Noring (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 22, 2014. The claimant did not comply with the hearing notice instructions and did not call in to provide a telephone number at which he could be contacted, and therefore, did not participate. The employer participated through Donna James, Human Resources Specialist; Alan Lenz, General Manager; Jesse Pettyjohn, Welding Supervisor; and Jim Stahl, Production Supervisor.

ISSUES:

The issues are whether the claimant is disqualified for benefits, whether he was overpaid unemployment insurance benefits, whether he is responsible for repaying the overpayment and whether the employer's account is subject to charge.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired full time in the welding/hardfacing department on January 28, 2004, and worked through April 7, 2014, when he was discharged due to violation of the employer's attendance policy. The employer's protest form indicated it was not protesting the claim and Human Resources Specialist Donna James confirmed in the fact-finding interview that it did not protest the claimant's receipt of benefits. This position changed when the employer hired a new general manager.

The employer's attendance policy provides that employees are discharged once they accumulate nine attendance points. The final absence was the claimant's no-call/no-show on April 3, 2014, when he reached nine points. Points are assessed for absences but one point can be deducted for 90 days of perfect attendance. The claimant started the year with six points and received two more for an absence on January 6, 2014, when his car would not start. He was suspended for three days on January 7, 2014, for eight attendance points.

Other absences that led to the termination occurred on June 19, October 24, November 11, and November 12, 2013. The employer has a no-fault attendance policy so the employer was unable to provide the reasons for the absences. The claimant did have approved leave under the Family Medical Leave Act (FMLA), but the employer said the absences under FMLA occurred after February 2014.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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. Misconduct is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits due to work-related misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on April 7, 2014, for violation of the employer's attendance policy. Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 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. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits.

In the case herein, the evidence establishes two unexcused absences. The employer could not provide the basis for the other four absences so it cannot be determined whether they were excused or unexcused under unemployment insurance laws. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Consequently, two unexcused absences are not excessive. The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). The employer has failed to meet its burden. Benefits are allowed.

DECISION:

The unemployment insurance decision dated April 29, 2014, (reference 01), is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css