

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JESSE L LUCY**

Claimant

**APPEAL NO. 09A-UI-14621-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TWIN COUNTY DAIRY INC**

Employer

**Original Claim: 04/06/08**

**Claimant: Respondent (2/R)**

Section 96.5-2-a – Discharge

Section 96.3-7 – Recovery of Overpayment of Benefits

**STATEMENT OF THE CASE:**

Twin County Dairy, Inc. (employer) appealed a representative's September 24, 2009 decision (reference 02) that concluded Jesse L. Lucy (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 October 27, 2009. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Steve Neuzil appeared on the employer's behalf. During the hearing, Employer's Exhibits One, Two, and Three were entered into evidence. Based on the evidence, the arguments of the employer, 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:**

After a prior period of employment with the employer in 2006, the claimant most recently started working for the employer on June 11, 2009. He worked full-time as a production worker on a 12:30 a.m.-to-1:00 p.m. schedule, four rotating days per week. His last day of work was July 31, 2009. The employer discharged him on or about August 3, 2009. The reason asserted for the discharge was excessive absenteeism.

The employer's policies, of which the claimant was on notice, provide that an employee can be discharged for even one no-call, no-show. The claimant was a no-call, no-show for work on July 8 and would have been discharged, but the employer chose not to discharge him but to give him a warning when it learned the reason for the absence was that he had been arrested for driving while suspended and was in jail. On July 21 the claimant was again a no-call, no-show for the start of his shift. Again, the employer chose not to discharge him but to give him a warning when it learned that he did call later and told a coworker that his transportation had broken down.

On July 30 the claimant was two hours late without an acceptable explanation. On August 1, he was again a no-call, no-show. As a result, the employer determined to discharge him. He was not scheduled to work again until about August 4. Mr. Neuzil, the production supervisor, called the claimant prior to that time and informed him that he was discharged. At that time, the claimant asserted that he had been ill on August 1. However, he did not have an explanation as to why he had not called in.

The claimant established a claim for unemployment insurance benefits effective April 6, 2008. He subsequently filed a new claim effective August 30, 2009. The claimant has received unemployment insurance benefits after the separation in the August 30, 2009 claim year.

### **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 that 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 that 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). Absences due to properly reported illness cannot constitute work-connected misconduct, since they are not volitional. Cosper, supra. The claimant's final absence was not excused and was not due to properly reported illness or other reasonable grounds, nor was an acceptable reason provided to excuse the failure to properly report the absence. The claimant had previously been warned that future absences could result in termination. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The employer discharged the claimant for reasons amounting to work-connected misconduct.

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 § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

**DECISION:**

The representative's September 24, 2009 decision (reference 02) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of August 1, 2009. 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. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue and whether the claimant is eligible for a waiver of any overpayment.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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