

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**TODD MILLER
414 FLETCHER AVE
MUSCATINE IA 62761-2044**

**UNION TANK CAR COMPANY
2603 IND CONNECTOR RD
MUSCATINE IA 52761**

**Appeal Number: 06A-UI-06864-ET
OC: 06-11-06 R: 04
Claimant: Respondent (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 3, 2006, 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 July 26, 2006. The claimant participated in the hearing. Jay Lloyd, Plant Manager, participated in the hearing on behalf of the employer.

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 carman welder for Union Tank Car Company from June 6,

2003 to March 27, 2006. The employer's attendance policy is a rolling, no-fault policy and assesses one point for a full day absence; a half-point for a half-day absence; and two points for a no-call/no-show. Points drop off after one year. Warnings are issued at six, eight, and ten points with termination occurring at 12 points. On September 15, 2004, the claimant had 10.5 points and was given a three-day working suspension; on February 24, 2005 the claimant had six points and received a written warning; on December 28, 2005 he received one point; on January 5, 2006 the claimant was absent, had ten points and received an at work suspension for three days; on February 7, 2006 the claimant was absent and received an at work suspension for three days; on February 16 and March 17, 2006 the claimant was absent, had ten points and received an at work suspension for three days; on March 17, 20, 21 and 22, 2006 the claimant was absent and was assessed points for those absences; on May 23, 2006 the claimant was absent and received one point and on March 24, 2006 he left early and was assessed another point and was suspended for five days pending discharge. The claimant used FMLA on two occasions due to two knee surgeries plus the chronic illness of his wife. The claimant always called and reported his absences and had doctor's excuses for all of his absences. He was discharged from employment due to a final incident of absenteeism on May 23, 2006, when he called in to report an absence related to his wife's illness. The claimant had exhausted his FMLA and had not worked enough hours in the previous 12 months to requalify for FMLA.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While the employer did follow its attendance policy, Iowa Workforce Development is not bound by the employer's policy. The claimant was off work on FMLA twice because of knee surgeries and used intermittent FMLA due to his wife's illness. He began accumulating points after exhausting his FMLA and also had not worked enough hours to requalify for the FMLA benefits. The last absence was due to the hospitalization and subsequent properly reported illness of the

claimant's chronically ill wife. Because the final absence for which the claimant was discharged was related to properly reported illness, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed.

DECISION:

The July 3, 2006, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

je/cs