

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DWIGHT G BRAUER
Claimant

APPEAL NO: 07A-UI-10871-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ELECTROLUX HOME PRODUCTS INC
Employer

OC: 10/14/07 R: 02
Claimant: Respondent (1/R)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Electrolux Home Products, Inc. (employer) appealed a representative's November 16, 2007 decision (reference 01) that concluded Dwight G. Brauer (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 December 11, 2007. The claimant participated in the hearing, was represented by Steve Norby, attorney at law, and presented testimony from one other witness, Dr. Francis Pisney. Mallory Russell 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?

FINDINGS OF FACT:

The claimant started working for the employer on February 22, 2005. He worked full time as an operator in the employer's Webster City, Iowa laundry equipment manufacturing facility. His last day of work was September 24, 2007. The employer discharged him on October 18, 2007. The reason asserted for the discharge was excessive absenteeism.

The employer has a ten-point attendance policy. The claimant had a substantial period of absence prior to July 2007 which was covered by FMLA (Family Medical Leave); his FMLA entitlement expired on July 9, 2007. Beginning July 17 he had another extended period of absence. His absences were due to chronic depression, stress and anxiety. He called in to the employer to report his absences virtually every day. However, he did not contact the employer's third party administrator of medical leaves. The claimant did not contact that administrator because he understood that he had no more FMLA; he did not understand that he might be eligible for short-term disability even if he was not eligible for FMLA. As a result, the employer assessed a point for every day of absence. On August 27 he was summoned to the employer for a meeting at which time he was given a final warning for attendance; at that time he was at 36.5 points. There is no evidence he was advised at that time he needed to be contacting the

third-party administrator. After the warning the claimant was still unable to return to work, and so continued to call in absences to the employer each day. The employer continued to assess a point a day.

While the claimant's doctor had been providing information to the employer's third-party leave administrator during the period from July 17 through September 25 regarding the claimant's inability to work, on September 27 the administrator denied the claimant short-term disability status because of a conclusion he had not properly reported his condition within three days of the start of the condition. It is not clear that the claimant actually received notification of the denial. He continued to call in his absences to the employer. On October 18 the employer summoned the claimant in to a meeting and discharged him for his absences, which by that time had totaled 65.5 days, all since July 1.

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).

Iowa Code § 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(1)a provides:

Discharge for misconduct.

(1) Definition.

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. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such 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. On the other hand 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(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.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. 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. Cosper, supra. It is further not an issue in this case as to whether the claimant might have been able to qualify for some type of short-term disability; the fact that he might not have properly reported his illness in order to qualify for short-term disability does not mean that he failed to properly report his absence to the employer for purposes of determining whether his absence is excused for unemployment insurance benefit eligibility. Here, the employer knew or should have known that the claimant would be absent for an extended period of time for a medical reason. Floyd v. Iowa Dept. of Job Service, 338 N.W.2d 536 (Iowa App. 1986). Because the final absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. 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.

An issue as to whether the claimant is medically able and available for work arose during the hearing. This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

DECISION:

The representative's November 16, 2007 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. The matter is remanded to the Claims Section for investigation and determination of the able and available issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs