

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHAD M HESS

Claimant

APPEAL NO: 14A-UI-00932-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SHELBY COUNTY COOKERS LLC

Employer

OC: 12/22/13

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Shelby County Cookers, L.L.C. (employer) appealed a representative's January 16, 2014 decision (reference 01) that concluded Chad M. Hess (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 February 11, 2014. The claimant participated in the hearing. Liliana Gonzalez appeared on the employer's behalf and presented testimony from one other witness, Aaron Long. During the hearing, Claimant's Exhibit A was entered into evidence. 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:

After a prior period of employment with the employer, the claimant most recently started working for the employer on February 2, 2012. He worked full time as a maintenance technician on the second shift in the employer's meat processing facility. His last day of work was December 19, 2013. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism. The most recent occurrence was a tardy on December 18, 2013.

The employer has a ten point attendance policy. Prior to December 18 the claimant had gotten to nine attendance points:

Date	Occurrence/reason if any	Points given/cumulative
05/12/13	Absent, called, personal business.	1.0 pt.
06/03/13	Tardy, no reason given.	0.5 pt.; 1.5 cum.
06/09/13	Absent, called, personal business.	1.0 pt.; 2.5 cum.
06/30/13	Absent, called, sick.	1.0 pt.; 3.5 cum.
07/07/13	Tardy, no reason given.	0.5 pt.; 4.0 cum.
07/30/13	Tardy over two hours, no reason given.	1.0 pt.; 5.0 cum.
08/22/13	Absent, called, personal business.	1.0 pt.; 6.0 cum.
09/21/13	Absent, called, personal business.	1.0 pt.; 7.0 cum.
11/24/13	Absent, called, sick.	1.0 pt.; 8.0 cum.
12/15/13	Tardy over two hours, overslept.	1.0 pt.; 9.0 cum.

After the claimant received his eighth point on November 24, 2013, he was given a written warning on December 9 which advised him where he stood on points.

The claimant's final tardy on December 18 was more than two hours and so was assessed as one point. On December 17, in regard to a child custody dispute, the claimant had been given a court order which indicated that within two days he was to submit to a hair stat test to detect illegal drug usage; he was informed that if he failed to comply, he would be in contempt of the court order. The drug test was to be arranged by the department of Human Services (DHS). The claimant was not told which day or what time the test would be. At about 9:50 a.m. on December 18 the claimant received a call from DHS indicating that he was to report for the test that afternoon at an office in Council Bluffs, about 45 miles away. He immediately contacted his supervisor and asked if he could switch his days off so that he could be off work that day, but the supervisor indicated that could not be done. He then advised his supervisor that it was likely that he would be two to three hours late because of the required drug test.

When the process in Council Bluffs was not concluded by about 2:45 p.m., the claimant again called the employer to report that in fact he would be late. The claimant did not leave Council Bluffs until about 4:00 p.m. He reported for work at about 6:21 p.m. Since that was more than two hours late, the one point was assessed, taking the claimant to ten points, resulting in his discharge on December 19.

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. Tardies are treated as absences for purposes of unemployment insurance law. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Occurrences due to properly reported causes which are outside of the employee's control 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 occurrence under its attendance policy. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). Because the final occurrence was related to a bona fide court order which the claimant could not reasonably disregard, 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.

DECISION:

The representative's January 16, 2014 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/pjs