

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

RICK A BROWN Claimant TYSON FRESH MEATS INC Employer	<div>68-0157 (9-06) - 3091078 - EI</div> <div>APPEAL NO: 12A-UI-04621-DT</div> <div>ADMINISTRATIVE LAW JUDGE DECISION</div> <div>OC: 04/01/12 Claimant: Appellant (2)</div>
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Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Rick A. Brown (claimant) appealed a representative's April 20, 2012 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Tyson Fresh Meats, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 15, 2012. The claimant participated in the hearing. Eloisa Baumgartner 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?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on May 23, 2011. He worked full time as a maintenance worker on a 6:00 a.m. to 6:30 p.m. shift. He was normally to work a four day on, three day off schedule, but frequently worked five or six days per week with only one or two days off. His last day of work was February 9, 2012. The employer suspended him that day and discharged him on February 10, 2012. The reason asserted for the discharge was excessive absenteeism.

The employer has a 14-point attendance policy. The policy provides that a no-call, no-show is assessed at three points per day. Prior to February 2 the claimant had worked six days, ending on January 31, 2012. He had a day off on February 1, but was scheduled to work on February 2, February 3, February 4, and February 5.

The claimant had just moved to Perry about a week or two prior to February 2. Since he was working so many hours he had not yet had an opportunity to arrange for telephone service.

While off work on February 1, he became extremely ill. He was unable to leave his dwelling for several days, sleeping the majority of the time. He was first able to leave his home late on February 4, when he made a trip to the emergency clinic. The doctor treated him with antibiotics and gave him a note excusing him from work through that day, but advised the claimant take more time and seek further treatment if he continued to feel ill. The claimant did not feel well enough to make a trip to the employer's facility that day after seeing the doctor, but went back home. He was still sick on February 5, and into February 8. He was still not recovered by February 8, so he went to see a general practitioner, who treated him with additional antibiotics and gave him a note covering his days of absence.

On February 9 the claimant reported in for work at 6:00 a.m. with his doctors' notes. The employer ultimately sent him home on suspension. Since the claimant did not have a phone, he had not called in his absences; he had attempted to use a phone at a local store one day, but that phone did not work, and the claimant did not know of any other phone he could try to use. He had no family or acquaintances in the area. When he returned to work on February 9, the employer informed him that as he was a no-call, no-show for the four scheduled days, he was assessed three points for each day, for a total of 12 points. The claimant previously had at least two points, taking him over the 14-point limit. As a result of the conclusion that the claimant had violated the attendance policy, the employer discharged the claimant on February 10.

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 and 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. 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. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). In this case, the reason for the final absences was not properly reported. However, it is clear that the claimant's failure to report his absences was not volitional, as he was physically unable to report them. Because the final absences were due to illness for which there was a reasonable ground for him to fail to report, 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 April 20, 2012 decision (reference 01) is reversed. 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