

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRETT M MOHLER
Claimant

APPEAL NO: 08A-UI-11281-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SUBWAY
Employer

**OC: 10/26/08 R: 03
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge
Section 96.7-2-a(2) – Charges Against Employer’s Account

STATEMENT OF THE CASE:

Fisher Investments, Ltd. doing business as Subway (employer) appealed a representative’s November 20, 2008 decision (reference 01) that concluded Brett M. Mohler (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 16, 2008. The claimant participated in the hearing and presented testimony from one other witness, Lynn Mohler. Heather Elliott appeared on the employer’s behalf and presented testimony from one other witness, Retha Spears. 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.

ISSUES:

Was the claimant discharged for work-connected misconduct? Is the employer’s account subject to charge?

FINDINGS OF FACT:

The claimant started working for the employer on August 4, 2008. He worked part time (approximately 15 – 25 hours per week) as a sandwich artist in the employer’s Albia, Iowa sandwich shop. His last day of work was October 23, 2008. The employer discharged him on October 24, 2008. The reason asserted for the discharge was a no-call, no-show absence from work.

Shortly after beginning his employment the claimant became ill with what became bronchitis and an upper respiratory infection. As a result, he missed several days of work, which were properly reported to the employer. His productivity did, however, suffer, and he was verbally warned about this by the employer. As he continued to have health problems, his doctor modified his medications, but the claimant was having great difficulty sleeping. He was scheduled to contact the employer for work by 12:00 p.m. on October 24, and had been reminded the prior evening that he would be needed for work at noon the next day.

The claimant finished work between 9:30 p.m. and 10:00 p.m. on October 23 and immediately went home and went to bed. He repeatedly awoke during the night, until he fell into a deeper sleep at approximately 5:00 a.m. He did not awaken for his alarm, and did not awaken for a phone call from his mother, Ms. Mohler. As a result, he overslept, not waking until approximately 1:15 p.m. He immediately called the employer, but was advised that at that time he was not needed further that day. Later that afternoon the store manager, Ms. Spears, contacted him and told him that as a result of his no-call, no-show for work by 12:00 p.m. on top of the prior productivity concerns, he was discharged.

The claimant established an unemployment insurance benefit year effective October 26, 2008.

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).

The final incident which triggered the discharge was his absence from work on October 24. Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 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 employer asserts that the reason for the final absence was not properly reported. However, it is clear that the claimant's failure to report his absence until an hour and 15 minutes after the start of his shift was not volitional, as his late call was also

caused by his illness and complications of his medications. Because the final absence was related to 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.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began July 1, 2007 and ended June 30, 2008. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's November 20, 2008 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