

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL S WILSON
Claimant

APPEAL NO: 13A-UI-01983-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OMAHA STANDARD INC
Employer

OC: 01/20/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Michael S. Wilson (claimant) appealed a representative's February 14, 2013 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Omaha Standard, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 2, 2013. The claimant participated in the hearing. Tom Kuiper of TALX Employer Services appeared on the employer's behalf and presented testimony from three witnesses, Karen Biggs, Robert Kissell, and Harry Schneckloth. 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 January 4, 2011. He worked full-time as a welder at the employer's Council Bluffs, Iowa truck body manufacturing facility. His last day of work was January 15, 2013. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism.

The employer's attendance policy provides that an employee can be discharged if his time missed exceeds 48 hours plus earned time; in the claimant's case, as of January 12, 2013 that number was 54 hours. Prior to January 12 the claimant had missed at least 9.17 hours for illness, at least 8.5 hours for tardiness, and at least 8.0 hours for court appearances or personal leave, and at least 8.0 hours of no-call/no-show, for a total of 49.3 hours. He had been given a final warning on July 31, 2012, at which point he was at 39.75 hours.

On Friday, January 11, 2013 the employer was seeking employees to sign up for five hours of voluntary overtime for Saturday, January 12. The claimant's lead man, Kissell, approached him before noon that Friday, and the claimant agreed to sign up for the overtime. That afternoon at the 2:00 p.m. break the claimant called his doctor as he had been feeling ill, and learned that he could get into see his doctor on Saturday. He then went and found Kissell and told him he needed to take his name off the list for working the Saturday overtime as he was going to go in for the doctor's appointment. Both when the employer questioned Kissell on January 15 and during the hearing in this case, Kissell acknowledged that it was possible that the claimant had requested to be taken off the overtime list for Saturday.

However, the claimant's name was not removed from the list for January 12, and when he did not report, the employer considered him to be a no-call/no-show. These additional five hours put the claimant at 54.8 hours of missed time, and the employer then discharged the claimant.

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. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). The employer has not rebutted the claimant's direct testimony that he had rescinded his agreement to work the Saturday overtime; in fact, the employer's evidence tends to support the claimant's contention. The employer has not established by a preponderance of evidence that the final occurrence on January 12 was an unexcused absence. 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 February 14, 2013 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

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