IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JEFF KELLY-ROSALES
Claimant

CARGILL MEAT SOLUTIONS CORP
Employer

APPEAL NO: 12A-UI-14819-BT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/28/12
Claimant: Appellant (1)

Iowa Code § 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

Jeff Kelly-Rosales (claimant) appealed an unemployment insurance decision dated December 5, 2012, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from Cargill Meat Solutions Corporation (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 22, 2013. The claimant participated in the hearing with union representative Brian Ulin. The employer participated through Angie Stevens, Human Resources Generalist. 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:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a part-time production worker from June 24, 2008 through August 31, 2012 when he was discharged from employment due to violation of the employer's attendance policy. The employer has a progressive disciplinary policy and employees are assessed attendance points for absences. Two points are issued for a no-call/no-show, one point is issued for a reported absence, and a half point is issued for a tardy. Written warnings are issued at seven points, a second written warning is issued at eight points and employees are discharged if they accumulate nine points.

The claimant received two written warnings for attendance on June 19, 2012. The warning for seven points was issued for an absence on June 11 and the warning for eight points was for the absence on June 13, 2012. He missed work again on June 26, 2012 and received a termination notice on July 2, 2012 for accumulating nine attendance points. Employees are not discharged

until a final investigation is completed. The employer chose not to go forward with the claimant's termination but no points were removed from his record.

The final incident occurred on August 24, 2012 when the claimant was a no-call/no-show. However, before the employer completed his termination, he was late on August 25, 2012 and was absent again on August 28, 2012. The claimant was discharged with 12.5 attendance points.

The claimant was attending school on a soccer scholarship. The employer allowed him to miss work as long as prior arrangements were made to excuse the absences. During the time the claimant accumulated attendance points, there was no approved leave or scheduled absences. He also failed to turn in any notes after the fact.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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.

Iowa Code section 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.

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on August 31, 2012 for 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. 871 IAC 24.32(7).

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

The claimant contends he was allowed to miss work for soccer games and it was previously excused by the employer. The employer agrees that the claimant was allowed to miss work as long as the absences were approved or scheduled in advance. The claimant had received two written warnings and a termination notice so he knew his job was in jeopardy. If he had to miss work for a school-related soccer event, he should have provided a schedule to the employer in advance of the absences and made sure the absences were going to be approved prior to the dates he was going to miss.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absences, in combination with the claimant's history of absenteeism, are considered excessive. Benefits are denied.

DECISION:

The unemployment insurance decision dated December 5, 2012, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

_____
Susan D. Ackerman
Administrative Law Judge

_____
Decision Dated and Mailed

sda/tll