IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ROCKNE C MCINTOSH
Claimant

WELLS ENTERPRISES INC
Employer

APPEAL NO: 13A-UI-12521-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/18/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Rockne C. McIntosh (claimant) appealed a representative's October 31, 2013 decision (reference 04) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Wells Enterprises, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 3, 2013. The claimant participated in the hearing. Donna Klauza of Equifax/TALX Employer Services appeared on the employer's behalf and presented testimony from one witness, Mark McCarty. During the hearing, Employer's Exhibit One 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:

Reversed. Benefits allowed.

FINDINGS OF FACT:

After a prior period of employment with the employer, the claimant most recently started working for the employer on March 18, 2013. He worked full time as a crew leader on the night shift (7:00 p.m. to 6:00 a.m.) in the employer's LeMars, Iowa ice cream plant. His last day of work was the shift from the evening of September 24 into the morning of September 25, 2013. The employer discharged him on September 25, 2013. The reason asserted for the discharge was excessive absenteeism.

The employer has a "no-fault" attendance policy under which an employee will be discharged for accruing ten occurrences in a year. Prior to September 25 the claimant had accrued 9.5 occurrences. Those occurrences were:

Date	Occurrence/reason if any	Occurrences accrued.
04/14/13	Absent, tired due to lack of sleep.	1.0, cum. 1.0
04/24/13	Absent, tired due to lack of sleep.	1.0, cum. 2.0
06/16/13	Absent, knee injury.	1.0, cum. 3.0
06/17/13	Absent, knee injury.	1.0, cum. 4.0
06/18/13	Absent, knee injury.	1.0, cum. 5.0
06/19/13	Absent, knee injury.	1.0, cum. 6.0
06/20/13	Absent, knee injury.	1.0, cum. 7.0
06/21/13	Absent, knee injury.	1.0, cum. 8.0
06/25/13	Absent, took wife to hospital.	1.0, cum. 9.0
06/26/13	Tardy, due to lack of sleep for being with wife at hospital.	0.5, cum. 9.5

The claimant had provided a doctor's note on about June 18 regarding his knee injury which informed the employer he would be off work due to that injury through June 22.

As a result of these prior occurrences the claimant had been given warnings including a final written warning on June 27, 2013.

On September 25, 2013 the claimant's car would not start when he was preparing to head to work for his shift that evening. He tried calling various friends, family, and neighbors in the area, but none of them could give him a ride to work in time to be at work by the start of his shift. As a result he called the employer and advised that he would at least be late. Since being late resulted in the claimant being assessed another .5 occurrence and brought the claimant to at least ten occurrences, the employer informed him that he was discharged.

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. While the employer can choose to utilize a "no-fault" attendance policy, by definition a disqualification for misconduct is based only on a showing of "fault." *Huntoon*, supra. Absences due to properly reported illness or injury 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). Here, for the six occurrences in June which were due to the claimant's knee injury, the employer knew or should have known that the claimant would be absent through June 22, and these absences are treated as excused. *Floyd v. Iowa Dept. of Job Service*, 338 N.W.2d 536 (Iowa App. 1986). Likewise, the absence on June 26 because of taking his wife to the hospital is treated as excused for a good emergency reason outside of the control of the claimant. While the two absences and the one tardy for lack of sleep are reasonably treated as unexcused, and the final tardy due to lack of reliable transportation is also reasonably treated as unexcused, this only accounts for three of the ten occurrences. The employer has not established that the claimant had had excessive unexcused absences. 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 October 31, 2013 decision (reference 04) 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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