IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

TIM L SLOAN
APT D-2
107 WHEELER LN
LAFOLLETTE TN 37766

WEST SIDE TRANSPORT INC
PO BOX 9129
4201 – 16TH AVE SW
CEDAR RAPIDS IA 52409-9120

Appeal Number: 05A-UI-08207-DT
OC: 07/10/05 R: 12
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Tim L. Sloan (claimant) appealed a representative's August 3, 2005 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from West Side Transport, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 3, 2005. The claimant participated in the hearing. Laura Watson 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?

FINDINGS OF FACT:

The claimant started working for the employer on March 12, 2004. He worked full time as an over-the-road truck driver. His last day of work was June 5, 2005. The employer effectively discharged him on July 6, 2005. The reason asserted for the discharge was failing to return to work after a period of FMLA (Family Medical Leave).

The claimant had worked through April 11, 2005. On April 12, 2005 he arranged to go home and went to his home hospital, from which he was emergency transferred to another hospital with a back injury. He had a request for FMLA faxed to the employer; the physician's certification indicated that his return to work date was "unknown at present." He was hospitalized for several weeks; he had a doctor's appointment on May 26, 2005. At that time he discussed his return to work with his doctor, and the doctor gave him a release to return to work as of May 31, 2005 and faxed a copy to the employer. The doctor verbally told the claimant that there were restrictions, that he was not to do any heavy lifting for a while, but the written release did not contain those restrictions.

The claimant was recertified for work by a DOT physician and resumed driving on June 3, 2005. He was going to be given a load on June 5, 2005 that would have required heavy lifting, and he then informed the dispatcher that he could not do the lifting because of the restrictions. He had understood that the doctor has been sending the employer a description of the restrictions, but in fact the employer did not receive the information from the doctor regarding the restrictions until June 6, 2005. On June 5 he was given a different load to haul and was then pulled from duty, as the employer would not allow the claimant to resume driving unless he had a full release to perform all job functions which would include the ability to lift heavier weight than allowed by the doctor's May 26 restrictions. The claimant was therefore returned to FMLA status as of June 6.

The claimant checked in several times during June 2005 as required by his FMLA; he reported that he was next to be seen by his doctor on or about June 27, but that the doctor had had to reschedule for some time in July 2005. He contacted the employer again on July 8, 2005 regarding returning to work, but was told that his employment was considered ended because he had not returned by July 6, 2005, which the employer had considered to be the end of the allowable FMLA period. The employer had never communicated to the claimant what day it considered his FMLA to expire, especially after the FMLA had been suspended for a period of time beginning May 31 through June 5. The claimant had calculated that his FMLA would end on or about July 9, 2005.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue 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 decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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).

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(7) provides:

> (7) 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.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. 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 for the absence under its attendance policy. Cosper, supra. Where, as here, the employer is aware of the nature of the claimant's medical condition and has fair warning that he may continue to be absent for an extended period of time, which might even exceed the 12 weeks of FMLA, the failure of the claimant to return to work

simply because of the expiration of the FMLA is not misconduct and the absence is excused. Floyd v. Iowa Department of Job Service, 338 N.W.2d 536 (Iowa App. 1983). 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 August 3, 2005 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.

ld/pjs