IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ZLEH TOTAYE
Claimant

JACOBSON STAFFING COMPANY LC
Employer

APPEAL NO: 10A-UI-17470-D

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/1410
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Zleh Totaye (claimant) appealed a representative's November 14, 2010 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Jacobson Staffing Company, L.C. (employer). After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on February 10, 2011. The claimant participated in the hearing and was represented by Benjamin Bergmann, Attorney at law. The employer failed to respond to the hearing notice and appear at the time and place set for the hearing, and therefore did not participate in the hearing. During the hearing, Claimant's Exhibits A through E were entered into evidence. Based on the evidence, the arguments of the claimant, 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's predecessor owner, and then began working for the employer as of the change of ownership in about May of 2008. He worked full time as an assembler in the employer's tire manufacturing business client's facility, working a 6:30 a.m. to 3:00 p.m. schedule. His last day of work was November 18, 2010. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism.

The final occurrence which led to the discharge was that the claimant was about 30 minutes late on November 18, 2010, due to his car breaking down on the way to work. The employer had a six-point attendance policy. Prior to about August 15 the claimant had only about one or one and a half points, due to being late on a few occasions due to a train blocking access to the workplace. On August 15 he suffered an injury while on the job; a workers' compensation claim was filed. As a result of this injury, the claimant went to the doctor several times, for which he missed work at least a portion of the day. The employer assessed him between a half point and two points for these various occurrences. On October 18 the claimant filed a civil rights complaint against the employer due to issues he was having in the workplace. On November 8

the employer gave the claimant a "third 'written'" warning indicating he was at 5.5 attendance points. The claimant believed the employer was assessing him points for the absences related to his work-related injuries because of his workers' compensation claim and because of his civil rights complaint.

When the claimant was late on November 18, the employer assessed him a half point, resulting in his reaching the six point termination level, so the employer discharged him.

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).

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 related 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). Absences due to issues that are of purely personal responsibility, including reliable transportation, are not excusable. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984); Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984). Tardies are treated as absences for purposes of unemployment insurance law. Higgins, supra. Even if the final occurrence is not treated as excused, the employer has not established that the claimant had excessive unexcused absences. Rather, it appears that about two-thirds of the claimant's absences were due to the work-related injury,

treated as excused, and only about a third of the occurrence points could possibly be considered as unexcused. The employer has failed to meet its burden to establish misconduct. Cosper, supra. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's November 14, 2010 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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