

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**THOMAS MARSHALL**  
Claimant

**APPEAL NO: 13A-UI-13636-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WEST LIBERTY FOODS LLC**  
Employer

**OC: 11/17/13**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the December 6, 2013, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 7, 2014. The claimant participated in the hearing. Nikki Bruno, Human Resources Supervisor and Lindy Helm, Human Resources Specialist, participated in the hearing on behalf of the employer.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time general production worker for West Liberty Foods from September 7, 2011 to November 12, 2013. He was discharged from employment due to a final incident of absenteeism that occurred on November 12, 2013.

The employer uses a point-based, no-fault attendance policy and employees are discharged upon reaching eight points. The employer's policy allowed employees 10 points prior to April 1, 2013, when it was changed. When the new policy went into effect the employer deducted two points from each employee's total and gave each employee two additional personal days. The claimant had 8.50 occurrences at the time of the change in policy.

The policy states that an unexcused absence results in one occurrence and an incident of tardiness of four hours or less results in one-half occurrence. Consecutive day absences accompanied by a doctor's note count as one occurrence for the first seven calendar days. Employees received verbal warnings in writing when they accumulate between three and four and one-half occurrences; five and six and one-half occurrence and seven and seven and one-half occurrences.

The claimant received the occurrences that led to his dismissal with absences December 28, 2012, when he was absent due to properly reported illness and received one point; January 11, 2013, when he left early and received one-half of an occurrence; January 30, 2013, he was absent for personal reasons; May 30, 2013, he was absent due to properly reported illness; July 25, 2013, he left early and received one-half an occurrence; August 19, 2013, he was tardy because he had to attend court, which started late prompting the judge to write him a note but he received one-half occurrence; September 20, 2013, he was absent due to properly reported illness and received one occurrence; September 21, 2013, he was absent due to personal reasons as he did not have a ride that day, and received one occurrence; November 1, 2013, he was absent due to properly reported illness and received one occurrence; and on November 12, 2013, he called Human Resources Supervisor Nikki Bruno personally after the start time of his shift to explain he had been in jail the night before in Muscatine County and had just been released but his vehicle was in Wilton, Iowa. He told her he knew he could not get to Wilton to pick up his truck and then get to work without missing at least one-half of his shift which would result in his exceeding the allowed number of attendance occurrences. Ms. Bruno reviewed all of the claimant's occurrences looking for a way he could retain his job but finally determined the claimant had received all required warnings and had exhausted all of his options and notified him that his employment was terminated.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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(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.

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).

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The standard in

attendance cases is whether the claimant had an excessive unexcused absenteeism record. (Emphasis added). While the employer's policy may count absences accompanied by doctor's notes as unexcused, for the purposes of unemployment insurance benefits those absences are considered excused.

While the claimant had four absences due to properly reported illness, the remaining four were due to personal issues, with an additional one-half point added for an incident of tardiness. One of the personal absences occurred because the claimant did not have a vehicle or a ride; one occurrence for personal reasons took place when the claimant left work early on two occasions; one was unexplained; and one happened when the claimant was scheduled to attend a court hearing but it started late and he was assessed one-half occurrence even though the judge wrote him a note explaining the situation. The last absence was the result of the claimant being arrested for not having a driver's license and having his truck impounded. As a result, he was absent from work November 12, 2013, because he was arrested in a different county, and had to make arrangements to get home from there as well as to go get his truck from impound. The claimant credibly testified he actually did have a driver's license at that point and it was an administrative error that caused law enforcement to initially believe he did not have a driver's license. Excluding the four occurrences for properly reported illness, the claimant had four and one-half occurrences between December 28, 2012, and November 12, 2013, for personal reasons. Four and one-half occurrences in an 11-month period is not excessive as defined by Iowa law. Therefore, benefits must be allowed.

**DECISION:**

The December 6, 2013, reference 02, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/pjs