**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**BRETT EDGERLY**
Claimant

**CARGILL INCORPORATED**
Employer

**APPEAL NO: 13A-UI-03940-ET**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 03/03/13**
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the March 21, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on May 1, 2013. The claimant participated in the hearing. Scott Ites, Plant Superintendent and Frankie Patterson, Employer Representative, 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 elevator operator for Cargill Incorporated from February 8, 2010 to February 28, 2013. He was discharged for exceeding the allowed number of attendance points.

The employer uses a point-based, no-fault attendance policy and employees are discharged upon reaching eight points. A properly reported one-day absence or an incident of tardiness without prior notification results in one attendance point; an incident of tardiness with prior notification results in one-half point; and a no-call/no-show or missing a mandatory safety meeting results in four points. Points drop off one year after occurrence. The employer issues a written warning to an employee when he reaches five points and a final written warning when he reaches seven points. If an employee shows a pattern of reaching seven points and waiting for one point to drop off and then gains another point repeatedly, the employer may terminate him.

On February 4, 2012, the claimant received one point and he had carried over four points from the previous year. Four points dropped off throughout 2012 until the claimant received one point due to properly reported illness of himself or his child September 5, 2012. On October 8, 2012, the claimant received one point due to the properly reported illness of himself or his child. On November 18, 2012, the claimant, who had just got divorced but was still living at his

ex-wife's house, was physically assaulted by his ex-wife. He called the employer and stated he would not be in but did not call his supervisor because he was upset and had to move to his parents' home that day. The employer assessed him four points for that absence, stating it was a no-call/no-show. On February 23, 2013, the claimant's truck would not start for approximately 15 minutes. He thought he could still make it to work on time but called when he realized he was going to be tardy and was one minute late in calling and five minutes late in arriving. Consequently, he received one point for that incident for a total of eight points and his employment was terminated for excessive unexcused absenteeism. The claimant received a final written warning November 18, 2012, and was told his job was in jeopardy.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful

wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

While the claimant did receive his seventh attendance point and final written warning November 18, 2012, he only had five absences between February 4, 2012 and February 23, 2013, which is just over one year's time. The claimant did have a four point absence November 18, 2012, but those were unusual circumstances and an isolated incident. Additionally, the claimant stated he did call the plant but did not call his supervisor on that date, even though that was his usual practice. Furthermore, the claimant's last absence was a one -minute late call to state he would be five minutes late. The claimant did violate the employer's attendance policy. In looking at the totality of his absences, however, the administrative law judge cannot conclude the claimant's absences were excessive under the meaning of the law. Therefore, benefits are allowed.

**DECISION:**

The March 21, 2013, reference 01, 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/css