

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SCOTT A GILMAN
Claimant

APPEAL NO. 13A-UI-04722-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GREGORY MFG CO
Employer

OC: 03/10/13
Claimant: Appellant (1)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated April 11, 2013, reference 01, which denied unemployment insurance benefits. After due notice, a telephone hearing was held on May 28, 2013. The claimant participated. The employer participated by Ms. Sherry Welcher and Mr. Shane Wellman.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Scott Gilman was employed by Gregory Manufacturing Company from May 21, 2012 until March 12, 2013 when he was discharged for excessive absenteeism and tardiness. Mr. Gilman was employed as a full-time painter scheduled to work 3:30 p.m. until 12:00 a.m. Monday through Friday and was paid by the hour. His immediate supervisor was Mike Tremaine.

Mr. Gilman was discharged from Gregory Manufacturing Company on March 12, 2013 when he arrived to work one half hour late in violation of a final warning that had been given to him on February 22, 2013.

Mr. Gilman had received a verbal warning for excessive absence and tardiness on December 13, 2012 and a written warning for attendance violation on February 7, 2013. On February 22, 2013 the claimant was issued a final warning and three-day suspension for excessive absenteeism and tardiness. Each warning listed the date of each attendance infraction and the reason.

Mr. Gilman did not dispute any of the infraction dates listed by the employer on any of his warnings although he was given the opportunity to do so. Although Mr. Gilman had been absent on numerous occasions for medical reasons related to his children or himself, days of

absence for medical reasons supported by medical documentation had not been counted against Mr. Gilman's attendance infractions. On February 22, 2013, Mr. Gilman was placed on notice that any additional absences or tardiness would result in his termination from employment. Employees are able to request days off in advance for doctor's appointments, etc. and those days will not be held against an employee's attendance infraction records.

On March 12, 2013 Mr. Gilman had taken one of his children to Iowa City for a doctor's appointment but had not requested time off in advance. While en route returning, Mr. Gilman concluded that because the appointment had run long and because of traffic that he might be late in reporting to work. Mr. Gilman telephoned the company but did not ask to speak to the company's human resource department as required for attendance or late arrival calls, but instead asked to speak to the supervisor of the paint department. When the claimant contacted Shane Wellman he asked "whether he should continue to drive 90 miles an hour in an attempt to report to work on time or slow down?" Mr. Wellman replied that the claimant should "slow down." When Mr. Gilman arrived at work that day one half hour late he was escorted from the premises and discharged. Mr. Gilman did not assert at that time that he believed that his absence was excused by Mr. Wellman.

It is the claimant's position that the company knew that he had a sick child when he was hired and that it is his belief that some of the attendance infractions attributed to him by the employer were covered by doctor's notes. It is the claimant's further position that the paint supervisor's advice to "slow down" in effect authorized his late arrival on March 12, 2013.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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.

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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

The Supreme Court of the state of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is a form of job misconduct. The court held that the absences must both be excessive and unexcused and that the concept includes tardiness, leaving early, etc. The court further held that absence due to illness or other excusable reasons are deemed excused if the employee properly notifies the employer.

The court in the case of Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984) held that absence due to matters of "personal responsibility" such as transportation problems are considered unexcused.

In the case at hand, Mr. Gilman was aware that he was to report attendance issues to the company's human resource department however the claimant did not do so on March 12, 2013. The claimant instead called the paint supervisor asking a rhetorical question about whether he should continue to drive at 90 miles per hour or be late. The paint supervisor's answer that the claimant should slow down was not an authorization for the claimant to be late, but the only reasonable answer that the supervisor could give to the claimant's rhetorical question about driving 90 miles an hour.

The evidence in the record establishes that the employer did not count absence days against the claimant that was for medical reasons when Mr. Gilman supplied documentation to the employer. Each of the claimant's numerous absences and tardy dates were listed on each warning and the claimant did not dispute any of the dates as the warnings were served upon Mr. Gilman and acknowledged by his signature. Mr. Gilman had the option of requesting March 12, 2013 off for the medical appointment but did not request the time off in advance. Mr. Gilman therefore was expected to report to work on time that day and was discharged when he failed to do so.

Although sympathetic to the claimant's situation, for the above-stated reasons, the administrative law judge concludes that the employer has sustained its burden of proof in establishing the claimant's discharge took place under disqualifying conditions. Unemployment insurance benefits are withheld.

DECISION:

The representative's decision dated April 11, 2013, reference 01, is affirmed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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