

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CLINTON C CARLSON
Claimant

APPEAL NO. 07A-UI-06175-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**ADVANCED UNDERGROUND
CONSTRUCTION LLC**
Employer

**OC: 02/04/07 R: 02
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Clinton C. Carlson (claimant) appealed a representative's June 12, 2007 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Advanced Underground Construction, L.L.C. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 9, 2007. The claimant participated in the hearing and presented testimony from one other witness, Jay Alderman. Jay Simonini appeared on the employer's behalf and presented testimony from one other witness, Matt Smith. During the hearing, Employer's Exhibits One through Three were entered into evidence. 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 May 5, 2005. He worked full time as a laborer/operator in the employer's underground utility business. His last day of work was May 22, 2007. The employer discharged him on that date. The reason asserted for the discharge was excessive tardiness.

The claimant's work schedule was to start at 7:00 a.m., Monday through Friday. Employees were expected to call prior to 7:00 a.m., preferably by 6:45 a.m., if they were going to be late or absent. Since January 1, 2007 and prior to May 21, 2007 the claimant had been late six times by at least 15 to 30 minutes (clocking in between 7:15 a.m. and 7:30 a.m.) and he had not called to report he would be late; five of the occurrences were on and after April 5, 2007. He also was a no-call/no-show on April 12 and had called in late sick on April 13. Most if not all of the tardies in April and May were due to the claimant having car problems and having to get a ride from a neighbor.

Mr. Simonini, the operations and logistics manager, had spoken to the claimant on several of the occasions regarding his tardiness and lack of calling; on April 30, when the claimant had reported for work at 7:16 a.m., Mr. Simonini had told the claimant to go home as a consequence of his continued tardiness.

On May 21, the claimant was not at work by 7:00 a.m. Mr. Simonini called the claimant at approximately 7:03 a.m. and the claimant reported he was trying to get in to work. Mr. Simonini told him not to bother, that the crew was leaving. When the claimant sought to return to work on May 22, he was discharged.

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); Iowa Code § 96.5-2-a.

Iowa Code § 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.

Tardies are treated as absences for purposes of unemployment insurance law. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Tardies due to issues that are of purely personal responsibility such as reliable transportation are not excusable. Higgins, supra; Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984). The claimant's final tardy was not excused and was not due to illness or other reasonable grounds. The claimant had previously been warned about his tardies being unacceptable. Higgins, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's June 12, 2007 decision (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of May 22, 2007. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css