

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT KUNKEL

Claimant

APPEAL NO: 10A-UI-06039-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

LABOR READY MIDWEST INC

Employer

OC: 02-07-10

Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the April 8, 2010, reference 03, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 10, 2010. The claimant participated in the hearing. The employer did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. This hearing was originally scheduled June 15, 2010. When the administrative law judge went back to listen to the recording for a particular comment it was discovered the tape was missing so the hearing was informally rescheduled and held July 10, 2010.

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: A disqualification decision was mailed to the claimant's last-known address of record on April 8, 2010. The claimant did not receive the decision prior to the due date because the Agency listed the wrong number for his post office box. Consequently, the claimant did not receive the decision until April 21, 2010, at which time he filed an appeal. Therefore, the administrative law judge concludes the claimant's appeal is timely.

The claimant was employed as a full-time flagger for Labor Ready Midwest last assigned to WK Construction from April 2009 to June 13, 2010. He was told at the time of hire he had to commit to working for 13 weeks and work the lower paying, as well as the higher paying, jobs. On June 13, 2009, after finishing a job in southern Iowa, the claimant was informed he would next be going to Waukon, Iowa, for a new job with WK Construction to start June 14, 2009. He offered to give other members of the crew a ride to the worksite and told them to meet him at 5:30 p.m. so they could drive to Waukon the night before. He then went and put new tires on his truck. At approximately 4:30 p.m. June 13, 2009, he received a call from Mark Otterback from Labor Ready and was told he was discharged from the assignment. The claimant asked

him why several times but Mr. Otterback said he could fire him for any reason and did not have to give him a reason. The claimant heard from others that Mr. Otterback wanted to give the position to one of his friends. The claimant had not been warned for any conduct prior to his termination from employment. The claimant asked if he would be on the next assignment scheduled to start that Friday and was told he would not and the employer did not need him anymore.

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). An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the

reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. The claimant reported he would be at the job site the next day, but the employer wanted to give the position to one of his friends, so he discharged the claimant. Inasmuch as the employer had not previously warned the claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Therefore, benefits are allowed.

DECISION:

The April 8, 2010, reference 03, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css