

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN A PILCHER
Claimant

APPEAL NO. 11A-UI-15428-AT

**ADMINISTRATIVE LAW JUDGE
DECISION**

P LANG CONSTRUCTION
Employer

OC: 10/30/11
Claimant: Appellant (2)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Kevin A. Pilcher filed a timely appeal from an unemployment insurance decision dated November 28, 2011, reference 06, that disqualified him for benefits. After due notice was issued, a telephone hearing was held December 30, 2011, with Mr. Pilcher participating. The employer, P. Lang Construction, did not respond to the notice.

ISSUE:

Was the claimant discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Kevin A. Pilcher was employed by P. Lang Construction as a roofer from January 27, 2011, until he was discharged October 29, 2011, by Owner Pat Lang. Mr. Pilcher was absent on October 29 because he did not have enough gas for his car to get to work. He had left work early on October 28, 2011, with the permission of his foreman, Mark Bentley. Mr. Pilcher had worked through his lunch and had completed eight hours of work. He had also left work early with permission on October 27, 2011, for a dental appointment.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence establishes that the claimant was discharged for misconduct in connection with his employment. It does not.

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 proof. See Iowa Code section 96.6-2. As noted above, the employer did not participate in the hearing. While excessive unexcused absenteeism is misconduct, not all absences are immediately considered to be unexcused. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The administrative law judge concludes that the final absence was unexcused. Mr. Pilcher was responsible for his transportation and did not have sufficient gas for his car. The evidence establishes that the partial-day absence on October 28, 2011, was pre-approved by his supervisor and that Mr. Pilcher had completed an eight-hour workday. The absence on October 27, 2011, was for a medical reason and was reported to the employer. A single unexcused absence is not sufficient to establish excessive unexcused absenteeism. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). No disqualification may be imposed.

DECISION:

The unemployment insurance decision dated November 28, 2011, reference 06, is reversed. The claimant is entitled to receive unemployment insurance benefits, provided he is otherwise eligible.

Dan Anderson
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw