

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEAN W VEN HUIZEN
Claimant

ECONOMY COATING SYSTEMS INC
Employer

APPEAL NO. 12A-UI-04750-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/19/12
Claimant: Appellant (4)

Section 96.5-2-A – Discharge for Misconduct
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated April 16, 2012, reference 01, which held that the claimant was not eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 28, 2012. Claimant participated. The claimant was represented by John Graupmann. Although the employer responded to the hearing notice and provided a telephone number at which a representative could be reached, no one was available when called by the administrative law judge. The individual who answered the telephone did try to locate either designated representative but she could not find them. A detailed message was left on how to participate in the hearing. No one from the employer called during the hearing.

At 10:00 a.m., after the record had been closed, Robin Genco-Marucci called. She said that she had been doing an orientation in another building. The administrative law judge explained that she needed to be available when called and that the record would not be reopened.

The record consists of the testimony of Dean Ven Huizen and Claimant's Exhibits A and B.

ISSUES:

Whether the claimant was discharged for misconduct; and

Whether the claimant is able and available for work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The claimant was hired on August 18, 2010, to work as a full-time mechanic for the employer. His last day of work was January 29, 2012. He called in sick on January 30, 2012. He spoke with Dennis Dever. The claimant had been hospitalized for chest pain. The claimant's doctor took him off work starting January 30, 2012, until February 23, 2012. (Exhibit A) This slip was

provided to the employer. The claimant's condition did not improve during his time off and he was taken off work again from February 20, 2012 through March 20, 2012. (Exhibit B)

The claimant called the employer on February 23, 2012, to report his situation. He was terminated because of company policy. The company policy required termination if an individual is absent more than thirty days due to illness.

REASONING AND CONCLUSIONS OF LAW:

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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the

employer. See Higgins, supra, and 871 IAC 24.32(7) In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8) See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988) The employer has the burden of proof to show misconduct.

There is no evidence of misconduct in this record. The claimant was terminated because he was absent more than thirty days with personal illness. Iowa law states that illness is considered an excused absence provided the employee properly notified the employer. The claimant called the employer and also provided the doctor's slip. There was no testimony from the employer on whether the claimant complied with its notification policy. The physician's slip clearly informs the employer that the claimant would be off work due to illness. Since there is no evidence of misconduct, benefits are allowed if the claimant is otherwise eligible.

The claimant established his claim for benefits on February 19, 2012. The testimony from the claimant shows that the claimant was not able and available for work at that time. He was released to return to work on March 21, 2012, and is actively looking for work. The claimant is therefore disqualified from receiving benefits from February 19, 2012, through March 20, 2012, because he was not able to work due to illness.

DECISION:

The decision of the representative dated April 16, 2012, reference 01, is modified in favor of the appellant. The claimant is not disqualified on the basis of the separation of employment. The claimant is disqualified from receiving benefits from February 19, 2012, through March 20, 2012, because he was not able and available for work. Unemployment insurance benefits are available beginning March 21, 2012, provided the claimant meets all other eligibility requirements.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css