

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LOUIS F MITCHELL
Claimant

APPEAL NO. 14A-UI-11454-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PICKETT SALVAGE LLC
Employer

OC: 10/05/14
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 October 22, 2014, reference 01, which denied unemployment insurance benefits finding the claimant was discharged from work on September 30, 2014 for excessive, unexcused absenteeism and tardiness after being warned. After due notice was provided, a telephone hearing was held on November 25, 2014. The claimant participated. Participating as a witness for the employer was Mr. Roy Elsberry, Former Employee. The employer participated by Mr. Nick Pickett, Company Owner, and Mr. Jasper Pickett, Metals Supervisor and Mr. Josh Long, Yard Manager.

ISSUE:

The 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: Louis Mitchell was most recently employed by Pickett Salvage, LLC. from October 2011 until September 30, 2014 when a decision was made to discharge him for failing to report for scheduled work without providing a notice to the employer of his impending absence. Mr. Mitchell had received a specific, final warning from his employer on September 15, 2014 that his attendance was unsatisfactory and that any further absences without notification to the employer would result in his termination from employment. Mr. Mitchell was aware that company policy required employees notify the employer of impending absences before 8:00 a.m. each morning. Claimant had previously been warned about his attendance and failure to provide adequate notice of absences in approximately March of 2014.

Mr. Mitchell had reported for scheduled work on Monday, September 29, 2014 and had not notified his employer that he would absent the following day, Tuesday, September 30, 2014. On Tuesday, September 30, 2014, although Mr. Mitchell was scheduled to work that day, he did not report and did not call in to report his impending absence as required by company policy and the warnings that had been served upon him. When the claimant was absent again that

day and again had not called in, a decision was made to discharge Mr. Mitchell from his employment. Because the claimant had not reported that day, the employer was unable to inform him of his termination. It appears that the employer intended on informing Mr. Mitchell of his discharge from employment when he again next reported for work.

On Wednesday, October 1, 2014, Mr. Mitchell again did not report for scheduled work but instead sent Mr. Pickett a text message stating that he would not work "in the mud." Mr. Pickett replied by text that employees work inside and referenced the claimant's absence the preceding day when there was "no mud." Claimant then referenced medical problems, a lawyer appointment and potential lack of gasoline as additional issues. Later that morning, Mr. Mitchell again sent text messages referencing his need for cash in going down the road. When the claimant wanted his paycheck for the week early the employer agreed and clarified that the other question was about whether Mr. Mitchell was planning on vacating the house that he was renting. Mr. Pickett then clarified to Mr. Mitchell that he had been terminated from employment because of his attendance and the claimant would be evicted for failing to make house payments. Mr. Mitchell responded, "Yep, a person has to do what they have to do."

It is Mr. Mitchell's position that he quit his employment and was not discharged by the employer. Mr. Mitchell maintains that the employer had violated the agreement of hire that only would have required Mr. Mitchell to perform preferred metal clipping work and that would have allowed Mr. Mitchell to come and go from work at his discretion. It is claimant's further position that all of his absences or leaving early took place with advanced notice to and permission from the employer and that the employer violated the terms of the agreement by requiring him to do other work assignment at times and by not recognizing his time away from work as authorized time to be gone.

REASONING AND CONCLUSIONS OF LAW:

The first question before the administrative law judge is whether the evidence in the record establishes that the claimant was discharged by the employer or whether the claimant quit work voluntarily. The administrative law judge concludes that the evidence establishes that the claimant was discharged by the employer on or about September 30, 2014 after the claimant had again failed to report for scheduled work without providing notification to the employer in violation of a specific final warning that had been given to him approximately two weeks before. The administrative law judge finds no evidence of an overt act on the part of the claimant as evidence of an intention to permanently sever the employment relationship. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980) and Peck v. Employment Appeal Board, 492 N.W. 2d 438 (Iowa Ct. App. 1992). The employer's testimony with respect to the job separation was consistent and logical and, therefore, is more credible. The question then becomes whether the claimant's discharge from employment took place under disqualifying conditions. It did.

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Since the claimant was discharged, 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 insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). 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).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires the consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absence related to issues of personal responsibility such as transportation and oversleeping are considering unexcused. On the other hand, absences related to illness are considered excused, providing the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness and leaving early are a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes that Mr. Mitchell did not follow the employer's attendance policy in connection with his absence on September 30, 2014. The evidence establishes that Mr. Mitchell had not provided notice to the employer in advance of the absence and had not been given authorization to be away from work. Claimant did not call in to report his impending absence nor did he report for work that day. Based upon the claimant's numerous incidences of failing to report for work and not notifying the employer, the employer had warned Mr. Mitchell in the spring of 2014 that he must provide the required notification. The employer issued the claimant a final warning on the subject on September 15, 2014 informing

Mr. Mitchell that future refractions where he did not provide notification would result in termination. The evidence in the record establishes the claimant's unexcused absences were excessive and that the claimant had properly been warned about his attendance and the need to notify the employer prior to his discharge.

The claimant's immediate discharge on September 30, 2014 was delayed because the claimant had not reported to work. In response to a perplexing number of text messages the following morning, the employer finally responded explicitly informing the claimant that he had been terminated whereupon the claimant acknowledged his termination via text.

Although the administrative law judge is aware that it is Mr. Mitchell's position that all absences were excused and that he had quit employment because of the employer's practices, the administrative law judge finds the claimant's testimony to strain credibility. The testimony of the employer's witnesses, including the yard manager, clearly refute these contentions.

Based upon the evidence in the record and the application of the appropriate law, the administrative law judge concludes that Mr. Mitchell was discharged for misconduct. Accordingly, Mr. Mitchell is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount providing that he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Mitchell.

DECISION:

The representative's decision dated October 22, 2014, reference 01, is affirmed. The claimant was discharged for misconduct. Claimant is disqualified for unemployment insurance benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, providing that he meets all other eligibility requirements of Iowa law. The employer's account will not be charged for benefits paid to Mr. Mitchell.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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