

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JASON A EKERN
Claimant

APPEAL NO: 07A-UI-05719-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PER MAR SECURITY & RESEARCH CORP
Employer

OC: 05/13/07 R: 04
Claimant: Appellant (2)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Jason A. Ekern (claimant) appealed a representative's May 24, 2007 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits, and the account of Per Mar Security & Research Corporation (employer) would not be charged because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 29, 2007. The claimant participated in the hearing. Dory Walker, the central station manager, and Toi Owens, the central station supervisor, appeared on the employer's behalf. 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:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on March 8, 2005. The claimant worked as a full-time central station dispatcher. Owens supervised the claimant. The employer's written policy informs employees they will receive a ½ point when they are late and do not notify a supervisor. The policy also states if an employee accumulates six or more points in a rolling six-month time frame, the employer will terminate the employee. The claimant accumulated six or more attendance points several times during his employment and the employer did not terminate him.

Walker considered the claimant a very good dispatcher and did not want to end his employment because he did not clock in on the employer's time system by the start of his shift. The claimant acknowledges there were a few times he overslept and did not report to work on time. Other times, the claimant was at work, but could not log in on the employer's time system in a timely manner. Once in a while the claimant was late for work because of adverse weather conditions.

On December 15, 2006, the employer gave the claimant a written warning for having accumulated seven points in a rolling six-month time frame. Owens told the claimant he needed

to improve his attendance. On December 24, the claimant called the employer to report he would be late for his 11:00 p.m. shift. On January 19, 23, March 11, 30 and 31, the claimant was late for work according to the employer's time keeping system. The claimant received a half point for each of the above occurrences. Owens and Walker again talked to him about reporting to work late. The employer did not consider the dates the claimant reported the employer's time system was not recording the correct time. Even though the employer talked to the claimant about making sure he reported to work on time, the claimant did not realize his job was in jeopardy.

In mid-April the employer discussed the claimant's performance evaluation with him. The evaluation indicated the claimant's attendance was poor and that he needed to improve it. The claimant did not report to work late again until May 12. On May 12, the employer's time system recorded the claimant had clocked or logged in at 11:09 p.m. The claimant had been at work on time for his 11:00 p.m. shift. Another person had been sitting in the claimant's area which prevented the claimant from clocking or logging in on time.

On May 14, 2007, the claimant had accumulated nine attendance points in a rolling six-month time frame. The employer discharged him for excessive tardiness after concluding the claimant made no attempt to improve his attendance by reporting to work on time.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. 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 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).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

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. 871 IAC 24.32(8).

In accordance with the employer's written policy the employer had justifiable business reasons for discharging the claimant. The facts, however, establish that even though the employer talked to the claimant about reporting to work on time, the claimant continued working even though he had accumulated six or more attendance points at various times during his employment. The employer did not enforce the employer's attendance policy. The claimant reasonably concluded that his job was not in jeopardy.

It is troublesome that the claimant reported to work late twice in January and three times in March, but was not discharged for reporting to work late these days. The employer instead discharged him on May 14 for reporting to work late nine minutes on May 12, even though he had been reporting to work on time since March 31, 2007. The facts indicate the claimant had made improvements on reporting to work on time.

The employer only considered the time that was recorded on the employer's time system to determine if an employee reported to work on time. The claimant asserted he had been at work on time on May 12, but was unable to clock or log in on the time system right away because another employee was sitting at his work station. Since the employer did not ask the claimant why he logged in at 11:09 p.m. and the claimant's explanation is credible, the facts establish that the claimant did not commit a current act of work-connected misconduct. Therefore, as of May 13, 2007, the claimant is qualified to receive unemployment insurance benefits.

DECISION:

The representative's May 24, 2007 decision (reference 01) is reversed. The employer discharged the claimant for justifiable business reasons. The claimant did not commit a current act of work-connected misconduct. As of May 13, 2007, the claimant is qualified to receive unemployment insurance benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefit paid to the claimant.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs