

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL BALL
Claimant

APPEAL NO: 15A-UI-04947-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

INVENTORY TRADING COMPANY
Employer

OC: 03/29/15
Claimant: Appellant (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the April 21, 2015, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on June 2 and continued on June 3, 2015. The claimant participated in the hearing. Pat Einarsen, Owner/Manager; Carol Engelken, General Manager; and Joyce Lehmann, Payroll and Attendance participated in the hearing on behalf of the employer. Employer's Exhibits One through Ten and Claimant's Exhibit A were admitted into evidence.

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: The claimant was employed as a full-time sales representative in the police and fire side of the business for Inventory Trading Company from September 13, 2011 to March 31, 2015. He was discharged for excessive unexcused absenteeism.

When the employer rehired the claimant in September 2011 the employer set out a list of requirements it expected the claimant to meet (Employer's Exhibit One). The employer was pleased with the claimant's progress with regard to the list until January 2015.

The claimant's anniversary date was August 31 and on that date each year he received three weeks of vacation. By January 6, 2015, the claimant had used all of his vacation in addition to his sick leave and casual days (Employer's Exhibit Two). Owner/Manager Pat Einarsen had a conversation with the claimant about the fact he had used all of his time off (Employer's Exhibit Two). Mr. Einarsen told the claimant he might allow him one or two days "as a pass" if he was ill but at the "rate he is going, he will have that used up and be out of here by March" (Employer's Exhibit Two). Mr. Einarsen called General Manager Carol Engelken and had her document the conversation he had with the claimant based on his notes taken during the meeting (Employer's Exhibit Two).

On January 22, 2015, Mr. Einarsen was out of town. Before leaving he directed Ms. Engelken to send the claimant a note the next time he was absent (Employer's Exhibit Three). The claimant called in January 22, 2015, and stated he was not coming in to work (Employer's Exhibit Three). Ms. Engelken reminded the claimant he was out of vacation and sick leave and continued, "Mike, this is not a write-up, but Pat really needs you to understand the position you are putting us in. He is very concerned and we don't have much wiggle room at this point. We need everyone to be here working as a team to help ensure a positive future" (Employer's Exhibit Three). The claimant responded in an email dated January 23, 2015, and stated he "truly grasps the significance of being absent and respect your leniency...I was sick about three days. The rest was trying to get ahead by double dipping on work. I feel the "wiggle room" comment, is not warranted, considering the above-mentioned. I will do my best to be here and on time I do hope we work as a team" (Claimant's Exhibit A). The employer offered the claimant an opportunity to look at his attendance record January 26, 2015, but the claimant declined.

On February 19, 2015, the employer asked Payroll and Attendance employee Joyce Lehmann which three employees had the largest attendance files in the company. She brought him the claimant's file as well as those of two other employees. Mr. Einarsen met with each individually. Mr. Einarsen told the claimant he changed his hours "dozens of times" without prior notice and his attendance practices had to stop as they were "unacceptable" (Employer's Exhibit Five).

On March 23, 2015, Mr. Einarsen, Ms. Engelken and Ms. Lehmann began drafting a written warning to give to the claimant regarding his attendance (Employer's Exhibit Six). Mr. Einarsen sent Ms. Engelken an email March 26, 2015, with language to add to the written warning she was preparing for the claimant at Mr. Einarsen's direction (Employer's Exhibit Seven). On March 26, 2015, Mr. Einarsen issued the written warning to the claimant (Employer's Exhibit Eight). The warning referenced the meeting the employer had with the claimant February 19, 2015, and detailed his absences between February 12 and March 26, 2015 (Employer's Exhibit Eight). The warning stated that the next incident of absenteeism unrelated to a physical illness would result in a three-day suspension (Employer's Exhibit Eight). Under the employer's attendance policy, after an employee is suspended the next incident results in termination.

On March 30, 2015, the local police went to the employer's premises and arrested the claimant for a charge unrelated to his job. He was in jail overnight. Mr. Einarsen was out of town on March 30, 2015, but received a text informing him of the situation. The employer notified the claimant his employment was terminated March 31, 2015, because of his absences March 30 and 31, 2015. The employer counted the March 30, 2015, absence as the claimant's next absence unrelated to illness following his March 26, 2015, written warning for which he would have faced suspension and the March 31, 2015, absence as his final absence which resulted in the claimant's termination.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

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).

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts of omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

When the claimant was hired, the employer wrote a specific list of expectations for him in response to the fact he was previously employed with the employer and was discharged for misconduct. The list of items the employer emphasized included, "Never ever late. Ever," and "All days needed off should be scheduled and you (sic) notified at least 3 days before hand to allow for our work load adjustments" (Employer's Exhibit One). While the claimant denies his termination was related to his attendance, he accumulated at least 26 incidents of partial or full day absenteeism unrelated to illness between August 13, 2014 and February 5, 2015 (Employer's Exhibit Nine). Although the claimant was not often late, he left early on at least 13 occasions without prior notice to the employer, he took long lunches on five occasions, and he took full or partial days of vacation that were not scheduled at least three days in advance on 13 occasions (Employer's Exhibit Nine). Some of the above dates overlapped; for example the claimant left early without prior notice and used vacation time, accounting for the higher number of occurrences than listed in the first paragraph.

The claimant maintains he was discharged because he was arrested at work March 30, 2015. The employer's testimony and documentation, however, make it clear the claimant's termination was the result of his attendance. The employer talked to the claimant about his attendance February 19, 2015, and sent him an email March 23, 2015, "to stress the seriousness of our concern on how you miss work (sic). Lately it has been a disaster," (Employer's Exhibit Six). The employer did not want to discharge the claimant as evidenced by the language he used in the written warning. He stated he was "heart broken by the events surrounding" the claimant's life. However, he also clearly stated, "I will terminate you in the event that you continue to manipulate your hours at the expense of this company..." He ended the warning by stating, "Mike your (sic) killing us. As a friend, I have turned a blind eye on things for too long. Please help me help you." The warning stated that any further incidents of unexcused absenteeism unrelated to illness would result in a three day suspension. An absence after that would result in termination. The claimant was absent part of the day March 30, 2015, when he was arrested and March 30, 2015, because he was held in jail overnight. Those two absences violated the warning and resulted in the claimant's termination.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

DECISION:

The April 21, 2015, reference 01, decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css