

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

KEVIN P CANTU
237 S RANSOM
OTTUMWA IA 52501

THE DEXTER COMPANY
PO BOX 310
FAIRFIELD IA 52556

Appeal Number: 06A-UI-05294-DWT
OC: 05/22/05 R: 03
Claimant: Respondent (4)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a - Discharge
Section 96.4-3 – Able to and Available for Work

STATEMENT OF THE CASE:

The Dexter Company (employer) appealed a representative's May 18, 2006 decision (reference 03) that concluded Kevin P. Cantu (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 7, 2006. The claimant failed to respond to the hearing notice by contacting the Appeals Section prior to the hearing and providing the phone number at which he could be contacted to participate in the hearing. As a result, no one represented the claimant. Kathy Baker, the human resource secretary, appeared on the employer's behalf. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

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

Is the claimant able to and available for work as of May 22, 2006?

FINDINGS OF FACT:

The claimant started working for the employer on August 17, 2004. The claimant worked as a full-time foundry laborer. The employer's attendance policy informs employees they are subject to progressive discipline if their absenteeism exceeds five percent. On March 21, 2005, the claimant received a verbal warning for attendance issues. On October 13, 2005, the claimant received a written warning for attendance problems. On November 10, 2005, the claimant received his final written warning or his last chance. On November 10, the employer informed the claimant he had to work as scheduled 95 percent of the time. If the claimant failed to work as scheduled, he could be discharged.

After the November 10, 2005 final warning, the claimant left work early, was late for work, overslept or had court appointments, which resulted in the claimant being unable to work as scheduled. It was not until May 2, 2006, when the claimant notified the employer he was ill and unable to work as scheduled that his absenteeism was more than five percent since November 10, 2005. The employer has no reason to doubt the claimant was not ill as he reported. Pursuant to the employer's attendance policy, the employer discharged the claimant on May 3 for violating the employer's attendance policy.

On May 13, 2006, the claimant was incarcerated. As of June 7 the claimant remained incarcerated and the law enforcement officials have no idea when the claimant will be released.

The claimant established a claim for unemployment insurance benefits during the week of May 22, 2005. The claimant filed an additional claim during the week of April 30, 2006. The claimant has not received any benefits since his employment ended on May 3, 2006.

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 § 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).

The law presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7). 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).

The claimant knew or should have known his job was in jeopardy on November 10, 2005, when he received the final written warning or the last-chance warning. While the claimant had a number of unexcused absences, the absence that resulted in his discharge occurred because the claimant was ill and unable to work on May 2. As a result, the employer discharged the claimant for compelling business reasons. These reasons do not amount to a current act of work-connected misconduct. Therefore, as of May 22, 2006, the claimant is qualified to receive unemployment insurance benefits based on the reasons for his employment separation.

Each week a claimant files a claim for benefits, he must be able to and available for work. Iowa Code § 96.4-3. The facts establish the claimant has not been able to and available for work as of May 13 when he was incarcerated. 871 IAC 24.23(12). The claimant is not eligible to receive benefits as of May 14, 2006. The claimant shall remain ineligible until he establishes a new benefit year and establishes his availability for work.

DECISION:

The representative's May 18, 2006, reference 03, decision is modified in the employer's favor. The employer discharged the claimant for business reasons that do not constitute a current act of work-connected misconduct. As a result, the reasons for the claimant's employment separation on May 3, 2006 do not disqualify him from receiving unemployment insurance benefits. The employer's account may be charged for benefits paid to the claimant. The claimant, however, is not available to work as of May 14, 2006. The claimant is not eligible to receive benefits as of May 14, 2006. The claimant shall remain ineligible to receive benefits until he establishes a new benefit year and establishes that he is available to work.

dlw/cs