

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RON L NICOLAISEN**  
Claimant

**APPEAL NO. 10A-UI-14250-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ABILITIES UNLIMITED INC**  
Employer

**OC: 08/08/10**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Misconduct

**STATEMENT OF THE CASE:**

Employer filed an appeal from a decision of a representative dated October 13, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on November 29, 2010. Claimant participated. Employer failed to respond to the hearing notice and did not participate. The record consists of the testimony of Ron Nicolaisen.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**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 employer provides services to individuals with mental and physical disabilities. The claimant was initially hired in late October 2009, to assist consumers in residential living facilities. He was later given a position in the employer's workshop, again assisting consumers. He also did maintenance for the employer. The claimant was a full-time employee. The claimant's last day of work was July 16, 2010. He was terminated on July 16, 2010.

The reason the claimant was terminated was his alleged tardiness on July 16, 2010. The claimant and another employee were assisting a consumer who was getting off a bus. The claimant then escorted the consumer to the building. The claimant was working at the time he was considered tardy by the employer.

## 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.

Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer or in repeated acts or carelessness or negligence. 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 employer did not participate in the hearing and did not provide any testimony on the alleged act of misconduct. The claimant testified that he was terminated for tardiness. The incident that led to the claimant's termination is not misconduct. The claimant was assisting a consumer, which is part of his job. Why the employer considered the claimant to be tardy is unknown. Since there is no current act of misconduct, benefits are allowed if the claimant is otherwise eligible.

**DECISION:**

The decision of the representative dated October 13, 2010, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs