

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANIEL C SMITH
Claimant

APPEAL NO. 11A-UI-12187-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**AMERICAN BLUE RIBBON HOLDINGS LLC
VILLAGE INN & BAKERS SQUARE**
Employer

**OC: 07/17/11
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Employer filed a timely appeal from a representative's decision dated September 7, 2011, reference 02, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was held on October 13, 2011. The claimant participated personally. The employer participated by Mr. Tom Kuiper, Hearing Representative and witnesses, Mr. John Bloemer, General Manager and Mr. Dave Bailey, Assistant Manager. Employer's Exhibits One through Four were received into evidence.

ISSUE:

At 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: Daniel Smith was employed by Village Inn from March 31, 2010 until August 14, 2011 when he was discharged from employment. Mr. Smith worked as a full-time cook and was paid by the hour.

On August 14, 2011, Mr. Smith called in 20 minutes before the beginning of his work shift stating he was sick and would be unable to report to work that day. Because the claimant had been previously warned both verbally and in writing about unsatisfactory attendance and punctuality, a decision was made to terminate Mr. Smith from employment. Company policy requires that employees provide four hours advance notice of impending absences unless an employee is scheduled to work an opening shift. Because the facility was a 24-hour facility, the employer believed that Mr. Smith had not provided sufficient advance notice of his impending absence in violation of policy. The claimant had been warned in the past of the necessity to provide adequate notice.

On the morning in question, Mr. Smith awoke ill and contacted the employer immediately to report that he would be unable to come to work.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is establishes intentional misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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.

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. App. 1992).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, the discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on the current act. See 871 IAC 24.32(8).

In this matter Mr. Smith was discharged because he had failed to provide four hours advance notice of his impending absence on August 14, 2011. The claimant had been repeatedly warned that his attendance and punctuality were not satisfactory and the claimant had also

been warned in the past that he must provide adequate advance notice of impending absences to his employer.

On the morning in question the claimant had called in only 20 minutes in advance of his beginning time of 6:30 a.m. and therefore had not complied with the company's four-hour call-in policy.

The Supreme Court in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is a form of job misconduct. The Court held that the absences must be both excessive and unexcused and that the concept includes tardiness, leaving early, etcetera. The Court further held however that absence due to illness or other excusable reasons is deemed excused if the employee properly notifies the employer.

In this case the issue of whether the claimant engaged in disqualifying misconduct hinges upon the reasonableness of the claimant's notification on August 14, 2011. Although the claimant was aware that the company expected four hours advance notice of impending absence, the claimant was unable to provide four hours advance notice because he woke up feeling sick a short time before his 6:30 a.m. scheduled work time. The claimant immediately notified the employer that he would be unable to work due to illness but was unable to comply with the company's four hour advance notice rule through no fault of his own.

The question is not whether the employer has a right to discharge an employee for this reason but whether the discharge is disqualifying under the provision of the Employment Security Law. While the decision to terminate Mr. Smith may have been a sound decision from a management viewpoint, for the above-stated reason the administrative law judge concludes that the evidence does not establish willful misconduct sufficient to warrant the denial of benefits.

DECISION:

The representative's decision dated September 7, 2011, reference 02, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

css/css