

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ZACH D GEARY
Claimant

APPEAL NO. 09A-UI-07847-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

A-LERT
Employer

OC: 04/19/09
Claimant: Appellant (1)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Zach Geary filed an appeal from a representative's decision dated May 20, 2009, reference 01, which denied benefits based on his separation from A-Lert. After due notice was issued, a hearing was held by telephone on June 16, 2009. Mr. Geary participated personally. The employer participated by Julie Sumner, Employee Services Assistant.

ISSUE:

At issue in this matter is whether Mr. Geary was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Geary was employed by A-Lert from September 18, 2008 until April 13, 2009. He worked full time as an ironworker. He was discharged because of his attendance.

Mr. Geary was late reporting to work on six occasions beginning December 13, 2008. The last occasion of tardiness was on April 7, 2009. He was absent the full shift on nine occasions beginning December 12, 2008. He also left early on some occasions but never without permission. Mr. Geary received a written warning for attendance on February 6 and a one-day suspension on February 23. He was suspended for three days beginning March 20 due to attendance.

Mr. Geary's final absences were on April 9 and 10. He saw a doctor on April 13 and was released to return to full duty with no restrictions on April 14. The doctor's note does not indicate the nature of the treatment. Mr. Geary was notified of his discharge on April 13. Attendance was the sole reason for the separation.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). An individual who was discharged because of attendance is disqualified from benefits if he was excessively absent on an unexcused basis. In order for an absence to be excused, it must be for reasonable cause and must be properly reported. 871 IAC 24.32(7). The administrative law judge is not bound by an employer's designation of an absence as unexcused. Tardiness in reporting to work is considered a limited absence from work.

From December 13 through April 7, a period of approximately four months, Mr. Geary was late reporting to work on six occasions. The evidence of record does not establish any justification for the tardiness and, therefore, it is unexcused. Six periods of unexcused absenteeism during four months is excessive. Mr. Geary had been amply warned that his attendance was jeopardizing his continued employment. In spite of the warnings, he continued to accumulate periods of unexcused tardiness. The last tardiness was on Tuesday, April 7. He was absent from work on April 9 and 10 and was discharged the following Monday. The administrative law judge considers the tardiness of April 7 to be sufficiently current to support a disqualification from benefits.

The administrative law judge was not persuaded that Mr. Geary's absences of April 9 and 10 were, in fact, due to an ankle injury. He testified that he did not seek medical treatment until April 13, the fourth day after the injury. The doctor's note then releases him to return to work without restrictions on April 14. If the ankle was not so injured that he could go without medical attention, it must have been sufficiently healed by April 13 that he could be released without restrictions on April 14. If the injury had healed by April 13, there would seemingly be no need for him to see a doctor on that date. His prior ankle injury resulted in him missing an entire week of work. Moreover, when he called to report the absence, he did not mention an injury, only the fact that he would not be at work. For the above reasons, the administrative law judge concludes that the absences of April 9 and 10 were not due to illness or injury.

DECISION:

The representative's decision dated May 20, 2009, reference 01, is hereby affirmed. Mr. Geary was discharged for misconduct in connection with his employment. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he is otherwise eligible.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs