IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PATRICK SCHMELZER
Claimant

WINNESHIEK COUNTY
Employer

APPEAL NO: 15A-UI-14194-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/22/15
Claimant: Appellant (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the December 17, 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 January 19, 2016. The claimant participated in the hearing with Chiropractor Dr. David Gehling. Paul Grufe, Human Resources Representative; Dana Williams and Beth Novotny, Administrative Assistants; John Logston, County Supervisor Chair; and Dean Thompson, County Supervisor; participated in the hearing on behalf of the employer.

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 equipment operator I for Winneshiek County from November 1, 1999 to November 24, 2015. He was discharged for inappropriate use of sick leave.

On November 2, 2015, the claimant arrived at work following a two-week vacation. He left after two hours to go see his chiropractor, Dr. David Gehling, because he had been kicked in the right leg by a cow October 18, 2015. He did not have any bruising or swelling until the week before he was to return to work at which time he sought treatment from Dr. Gehling. The claimant did not return to work November 3, 2015, and at 7:37 a.m. November 3, 2015, 37 minutes after the start time of his shift, he notified the office he would not be in that day and would be gone the remainder of the week. The employer told him he would need a doctor's note when he returned because his absence was going to exceed three days. There was further discussion between the claimant and administrative assistants, Dana Williams and Beth Novotny, regarding whether the claimant's time that week should be classified as sick leave, comp time or vacation. At 9:21 a.m. the claimant forwarded a note from Dr. Gehling which stated the claimant could not do

any type of work activities for the rest of the week. The employer determined the claimant was on sick leave. The claimant's work activities would have consisted of walking to the road grader and sitting in it while driving it throughout the day.

On November 3, 2015, at 9:30 p.m. the claimant posted a picture on a local archery club's website of a trophy buck he shot with his bow. He also posted it on Facebook. On November 4, 2015, one of the administrative assistants, who had noticed the Facebook post about the claimant's buck, congratulated him and asked where he got the deer. The claimant stated he was doing chores and stumbled across the buck and shot it. As a result of the webpage and the claimant's conversation with the administrative assistant the employer became aware the claimant was hunting while on sick leave.

On November 20, 2015, the employer held a name clearing hearing provided for by the collective bargaining agreement and attended by the claimant, his union representative and the employer. The employer is allowed to inquire of the claimant about the events in question during the hearing. The claimant explained he started deer hunting between 7:30 and 8:30 a.m. November 3, 2015, after getting his children on the bus. Based on the claimant's emails and text messages the employer learned the claimant texted his doctor's note from his deer blind. The claimant stated he walked to his deer blind about 100 yards away from his vehicle and then sat in the blind for 45 minutes before shooting the buck. The deer ran and the claimant testified he called his son and his friend and had them leave school to come out to track the buck which had travelled about 200 yards away from where the claimant shot him. Once the claimant's son and his friend dragged the buck back over a steep ravine the claimant had his picture taken with the animal. The employer asked the claimant where he gutted the deer and the claimant stated his son and his friend performed that task but the claimant said he could not remember where that took place. The entry under the picture stated, "Finally got it done November 3. Thanks to Cole and Kyler for helping me drag him out and taking some great pictures for me." The claimant talked to Ms. Williams and stated he knew the minute he posted the picture on Facebook there would be trouble.

When the claimant was released to return to work he was required to see the county's ARNP Kristen Heffern for a return to work release. Her notes reflected the claimant said he drove a four-wheeler to his deer stand. Dr. Gehling sent Ms. Herrern a letter stating the claimant could walk intermittently, should avoid sitting, use moist heat and elevate his leg at night, and continue his treatment with Dr. Gehling, who was concerned about the claimant forming a blood clot in his leg. Dr. Gehling was concerned about the claimant operating heavy equipment because he was concerned that he could injure himself or others if he did throw a clot. Consequently, he did not want the claimant to drive at work or any other time before he was released and thought the claimant understood he was not to drive. Dr. Gehling stated if asked by the claimant he would have told him not to go hunting.

The employer held a special board of supervisors meeting November 24, 2015, and notified the claimant his employment was terminated for inappropriate use of sick leave.

The claimant received a final written warning October 5, 2009, for inappropriate use of sick leave after he left at 11:00 a.m. for a two hour doctor's appointment September 25, 2009. While he was off on sick leave a member of the board of supervisors observed the claimant at a farm sale. The claimant indicated on his time sheet that he worked four hours and used four hours of sick leave. The employer issued the claimant a final written warning and forced him to change his time card to reflect four hours worked, two hours of sick leave used and two hours of comp

time used. The employer reminded the claimant that sick leave was only for confining or disabling events and that if he ever inappropriately used his sick leave again his employment would be terminated. He was also required to provide a doctor's excuse for each of his absences due to illness for the next four years.

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 § 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 or omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

The employer found inconsistencies in the claimant's statements about his absence and deer hunting. For example, he originally told Ms. Williams he was doing chores November 3, 2015, when he saw the deer, he told the employer he walked to his deer blind, and told Ms. Heffern he drove a four wheeler to his deer stand. He testified he drove out to the deer blind and walked the final 100 yards.

Dr. Gehling took the claimant off work the week of November 2, 2015, because he did not want him sitting and driving a road grader and believed the claimant understood he was not to drive. Dr. Gehling also testified he would have instructed the claimant not to go deer hunting while he was off work the week of November 2, 2015. Dr. Gehling's directions required the claimant to engage in some movement during the day and use ice periodically throughout the day and elevate his leg at night. The claimant determined that meant he could not work although he never gave the employer the opportunity to accommodate his restrictions, which could have been done with little effort. Dr. Gehling was concerned the claimant would develop a blood clot and as a result experience serious health problems. Not only was the claimant's decision to go deer hunting when he was home from work and using sick leave inappropriate, it could have proved dangerous to him as well had he thrown a clot while out, alone, in his deer blind.

If the claimant was unable to perform his job duties, he should not have been deer hunting. The fact that his chiropractor took him off work implies he was not able to drive, which he did, or sit for a long period of time, which he did. If the claimant was able to drive home and then walk or ride to his duck blind, he should have been able to perform his job duties. The very nature of sick leave is that if the individual is too ill or injured to report to work he is too ill or injured to go out and engage in other activities as well.

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 December 17, 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/pjs