

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RANDY L FENNERN
Claimant

APPEAL NO. 13A-UI-09427-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WHIRLPOOL CORPORATION
Employer

OC: 12/23/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated August 8, 2013, reference 02, which denied unemployment insurance benefits. After due notice was provided, a telephone hearing was held on September 19, 2013. Claimant participated. Although duly notified, the employer did not respond to the notice of hearing and did not participate.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct in connection with his work.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Randy Fennern was employed by Whirlpool Corporation from May 2008 until July 18, 2013 when he was discharged from employment. Mr. Fennern was employed as a full-time production worker and was paid by the hour.

Mr. Fennern was discharged on July 18, 2013 based upon the company's "irregular attendance" policy. Under the policy the employer determines on a case-by-case basis whether an individual's attendance is acceptable to the company.

Mr. Fennern was last warned by the company regarding attendance in March 2013. At that time the claimant entered a "last chance" agreement with the company. Under the terms of the agreement, Mr. Fennern was subject to discharge for any further attendance infractions within 90 days. The claimant was aware of the terms of the warning and attempted to comply with them.

Mr. Fennern was required to call in absent on July 16, 2013 because he was ill with severe leg cramps and had been unable to sleep all night and Mr. Fennern properly reported his absence that day. On July 18, the claimant was required to start work one hour early but was delayed in reporting for work by approximately four minutes when a train unexpectedly blocked the road that he was traveling on. The claimant had attempted to start to work allowing sufficient time

but did not anticipate a train would be blocking the road at that unusual hour. Mr. Fennern was allowed to continue working approximately one and one-half days before being discharged from employment.

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.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial."

The Supreme Court in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 192 (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 are deemed excused if the employee properly notifies the employer.

In the case at hand the evidence establishes that following the claimant's final warning Mr. Fennern made a concerted effort to improve his attendance and punctuality. The claimant's absence on July 16 is deemed excused as it was for illness and was properly reported and the claimant's final attendance infraction when reporting for work four minutes late on July 18, 2013 were due to factors largely beyond the claimant's control. For these reasons the administrative law judge concludes that the employer has not met its burden of proof in establishing intentional disqualifying misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. Benefits are allowed providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated August 8, 2013, reference 02, is reversed. The claimant was discharged under non-disqualifying condition. Unemployment insurance benefits are allowed, providing that he is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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