IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KEITH B BRYHNE
Claimant

PER MAR SECURITY & RESEARCH CORP
Employer

APPEAL NO. 07A-UI-07411-H2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08-13-06 R: 02
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 23, 2007, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on August 29, 2007. The claimant did participate. The employer did participate through Chris Brooks, General Manager Electronics Division Des Moines Branch, and Amy Goodwin, Manager of Employee Benefits and Workers Compensation.

ISSUE:

Was the claimant discharged for work related misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a service technician full time beginning November 20, 2006, through June 7, 2007, when he was discharged.

The claimant was discharged for allegedly falsifying records and facts and for allegedly misrepresenting doctor's restrictions and his military duty.

The claimant belongs to a Reserve unit located in Kansas, approximately 350 miles from his home in Iowa. The claimant is required to perform weekend duty once per month. When it is his weekend to be present for duty, he is required to be there by Saturday morning at 6:30 a.m. or sometimes by 4:00 p.m. on Friday afternoon.

The claimant asked his employer for the following Fridays off so that he could drive to Kansas to perform his military duty: March 2, April 13 and May 4. The claimant was granted the time off and was not paid for the Fridays he did not work. On each of the Fridays he was off work, the claimant drove the six or seven hours to Kansas and performed his military duty over the weekend. Federal regulations provide that the claimant is allowed travel time to get to his reserve duty and time to rest before beginning his reserve duty.

The claimant sustained a work-related injury to his ankle for which he was receiving medical treatment. On June 5 the claimant was asked by Mr. Brooks what time his doctor appointment was for the following day. The claimant told Mr. Brooks he thought it was for either 9:00 a.m. or 10:00 a.m. The claimant's work location is in Fort Dodge and Mr. Brooks' work location is in Des Moines. Mr. Brooks told the claimant to call him after his doctor appointment on June 6 was completed to let him know what his ongoing work restrictions and work status would be. Mr. Brooks did not give the claimant any deadline by which time the call should be made or completed. The claimant's doctor appointment was at 10:00 a.m. He saw the doctor for approximately twenty minutes, and then waited for the clerical workers in the doctor's office to make copies of his doctor's notes for him to give to the employer. The claimant called Mr. Brooks on June 6 at 11:00 a.m. from the parking lot of the doctor's office to tell him the results of the visit. The doctor released the claimant to return to full duty work with the proviso that the claimant be allowed to wear a splint whenever he so chose and that the claimant be allowed to sit and elevate his ankle whenever he so chose.

Mr. Brooks instructed the claimant to call Amy Goodwin, the employer's workers compensation coordinator, to tell her the results of his doctor visit. Mr. Brooks did not give the claimant any time limit or deadline by which he was to complete his call to Ms. Goodwin. The claimant called Ms. Goodwin at 1:30 p.m. on June 6 and told her essentially the same thing he had reported to Mr. Brooks at 11:00 a.m. Prior to calling Ms. Goodwin, the claimant took his lunch break. The employer receives copies of all the claimant's medical records for his work-related injury. The claimant told both Mr. Brooks and Ms. Goodwin that he did not believe he would be able to return to work because he needed to elevate his ankle.

The employer's policies provide that an employee who receives three disciplinary warning will be discharged. The claimant had been warned one time on April 9 about failure to follow instructions. The claimant was discharged after receiving his second written warning.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

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 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 claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation.

The employer alleges that the claimant misrepresented the time he needed off work for military duty. The employer contends that the claimant should have worked at least one-half day on Friday and then driven to Kansas after his work shift ended. The claimant did not misrepresent his military duty weekends or the time he needed off work to actually get to Kansas to report for duty by 6:30 a.m. on Saturday morning. It is unreasonable for the employer to expect the claimant to make a six or seven hour drive with no time to rest before beginning his military duty. The administrative law judge concludes that the claimant did not falsify or misrepresent any facts, documents or circumstances with regard to his need for time off for military duty.

Additionally, the administrative law judge concludes that the claimant did not misrepresent his doctor's restrictions. The employer had access to the claimant's complete medical records, which allow the claimant to chose when to elevate his ankle. The claimant told the employer he could not work because he needed to elevate his ankle, which is in compliance with his medical restrictions. While the employer may not agree with the medical restrictions, their interpretation that the claimant should have returned to full duty work is not in accord with the totality of the restrictions, which provide the claimant with the final decision as to whether to elevate his ankle or not.

The claimant was not given any deadline by which he had to complete calls to both Mr. Brooks and Ms. Goodwin. The employer's assertion that the claimant unreasonably delayed in calling is not founded. The claimant called Mr. Brooks within one hour of his doctor's appointment start

time. The claimant called Ms. Goodwin within two and one-half hours after completing the visit. The claimant complied with the employer request that he notify them of the results.

The employer's evidence does not establish that the claimant deliberately and intentionally acted in a manner he knew to be contrary to the employer's interests or standards. There was no wanton or willful disregard of the employer's standards. In short, substantial misconduct has not been established by the evidence. Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

DECISION:

The July 23, 2007, reference 03, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

tkh/kjw