

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOHN P MCNAMARA**  
Claimant

**APPEAL NO. 06A-UI-10372-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**NASH FINCH CO**  
Employer

**OC: 09-24-06 R: 03**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the October 16, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on November 8, 2006. The claimant did participate along with his witness, his wife Ginger McNamara and was represented by Brian Fagen, Attorney at Law. The employer did participate through Dennis Glover, Human Resources Representative, and Larry Nesbitt, Shipping Manager, and was represented by Jacqueline Jones of TALX UC eXpress. Employer's Exhibit One was received. Claimant's Exhibit A was received.

**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 warehouse order selector full time beginning June 7, 1993 through September 26, 2006, when he was discharged.

The claimant called in sick to work on Sunday, September 24, 2006. The claimant was to work that day as part of his regular schedule. On September 24, 2006, the claimant went to church, where he ran into his direct supervisor, Larry Nesbit. Mr. Nesbit testified that the claimant told him he had called in sick to work because he just wanted to be with his family that day. The claimant continued to tell him that he has thought about hiding from him, but that he did not want to do that. Mr. Nesbitt heard the claimant tell him that he knew he should not have called in sick to work when he was not really ill because he wanted a day off to be with his family.

The claimant called in and took September 25, 2006 off work. When the claimant returned to work on September 26, 2006, he was called into Mr. Pistulka's office for a meeting with Mr. Nesbit. During that meeting, the claimant admitted that he should not have called into work sick and that he overall had good attendance. During the meeting, the claimant admitted that he was not sick on Sunday, September 24, when he called in sick to work. The claimant also argued that he should not be discharged, but instead should have been subjected to some other

lesser form of discipline. The claimant was told he was discharged for calling in sick to work when he was not really ill.

The claimant denies admitting to Mr. Nesbitt, either at church on Sunday, September 24, or on Tuesday, September 26, during their meeting, that he inappropriately called in to take sick leave. The employer's policy, a copy of which was given to the claimant specifically provides that "sick pay is to be used only for absences due to personal illness or injury..." The employer's policy also provides that fraudulent application for or collection of sick pay may result in disciplinary action up to and including termination.

### **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 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 administrative law judge is persuaded that the claimant called in sick to work on September 24 when he was not ill because he wanted to spend time with his family. The administrative law judge is persuaded that the claimant admitted to Mr. Nesbitt, both on Sunday and on Tuesday, that he was not ill when he called in off work. The claimant's argument during the Tuesday meeting that he should be subjected to a lesser form of discipline makes no sense if he believed he had done nothing wrong. There was no reason for Mr. Nesbitt to lie about

what the claimant said to him, particularly in light of the claimant's own testimony that Mr. Nesbitt always treated him well and in a professional manner. While an employee may be too sick to work, the administrative law judge does understand that they need not be home bound; however, the claimant's own admissions convince the administrative law judge that he was not ill, but just wanted time off. The claimant owed it to the employer to be honest with them, particularly about sick leave usage. The employer's evidence does 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 a wanton or willful disregard of the employer's standards. In short, substantial misconduct has been established by the evidence. Benefits are denied.

**DECISION:**

The October 16, 2006, 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.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

tkh/kjw