

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN J COLOMBO
Claimant

APPEAL NO. 09A-UI-14966-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

RMT INC
Employer

OC: 01/18/09
Claimant: Appellant (2)

Section 96.5-2-A -- Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated September 30, 2009, reference 03, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on November 3, 2009, in Dubuque, Iowa. Claimant participated. The employer asked to be contacted by phone. Two calls were placed to the employer and in both cases, voice mail picked up. Messages were left. The employer did not call in prior to the conclusion of the hearing and therefore did not participate in the hearing. The record consists of the testimony of John Colombo.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The employer in this case provides wind turbine technology. The claimant is a member of Local 288 of the International Brotherhood of Electrical Workers (IBEW). He was hired by the employer out of the union hall. The claimant is an electrician and his responsibility was to do the electrical work on wind turbines that were being erected near Hampton and Iowa Falls. The claimant was hired on July 6, 2009. When he started work, he informed the employer that he needed some days off and he specified exactly which dates those were. He also signed a white board in the office, which listed days off being taken by members of the crew.

On August 31, 2009, he was given a separation notice, indicating that he had been laid off. The employer's electrical superintendent wanted workers who would work every day and not take time off. The claimant was let go because he had missed some days, even though those absences had been reported in advance and excused.

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) The employer has the burden of proof to show misconduct.

In this case, the evidence established that the claimant did have numerous absences between the time he was initially hired on July 6, 2009, and the separation of employment on August 31, 2009. The claimant took several weekends off and also had a vacation to California from August 20, 2009 through August 26, 2009. The employer was informed by the claimant when he was hired that he needed to have these days off. The employer had approved these absences, according to the claimant.

The claimant was never warned that his failure to work seven days a week would lead to his termination. The claimant testified he was told that the employer wanted employees who did take time off and that he was being let go for having been absent. The employer did not participate in the hearing and therefore the claimant's testimony that his absences were excused is the only evidence on this issue. While the claimant's absences might have been

excessive from the employer's point of view, there is nothing to indicate that those absences were unexcused. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated September 30, 2009, reference 03, is reversed. .
Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css