

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JOEL C KEENE
Claimant

HY-VEE INC
Employer

APPEAL NO. 14A-UI-11379-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/05/14
Claimant: Appellant (2-R)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated October 22, 2014, reference 01, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on November 24, 2014. The parties were properly notified about the hearing. The claimant participated in the hearing. Julia Day participated in the hearing on behalf of the employer with witnesses, Caleb Cork and Time Hamman.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked part time for the employer as a cashier from January 2014 to September 16, 2014. He was informed and understood that under the employer's work rules, employees were required to notify the employer two hours before the start of their shift if they were not able to work as scheduled.

The claimant had been off work about five weeks due to gall bladder surgery. He returned to work at the end of the August, but continued to experience problems with infections and the effects of the medication he was taking.

The claimant was scheduled to work at about 9:30 a.m. on September 17, 2014. He was sick and unable to work due to complications from his gall bladder surgery. His mother took him to the emergency room at about 6 a.m. Because of his condition, he was not able to call the employer to notify the employer that he was going to be absent. That evening, however, the claimant had his girlfriend call the store and notify a manager that he had missed work that day because he was in the hospital and also that he was going to be absent on September 18.

The claimant's next scheduled day of work was September 22. He was about 45 minutes late for work that day because he stopped at his attorney's office to sign some documents that were needed for his social security disability claim.

The claimant had also been late for work on September 11 (14 minutes) and September 15 (21 minutes). The claimant had a history of tardiness, primarily due to oversleeping as a side effect of the medications the claimant took. He had never been counseled or warned about his attendance or tardiness. Whenever he was more than five minutes late, he called in to notify a supervisor that he was going to be late.

On September 22, 2014, the human resources manager, Caleb Cork, discharged the claimant for being absent without notice on September 17 and 18 and for tardiness.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Iowa Code § 96.6-2; Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The unemployment insurance rules provide: "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." 871 IAC 24.32(7).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. The claimant testified very credibly about the events leading to his discharge. His testimony outweighs the testimony of Caleb Cork about when and why the claimant was discharged.

The Iowa Court of Appeals in Gimbel v. Employment Appeal Board, 489 N.W.2d 36 (Iowa Ct. App. 1994) ruled that a claimant's late call the employer was excused because he was physically unable to call until his medical condition improved. Under this rationale, the claimant's absences on September 17 and 18 were due to legitimate medical reasons and should be considered excused absences because he was not able to personally call in and he had someone call in as soon as possible to advise the employer of his medical status.

The claimant had a history of tardiness that the employer condoned since the claimant and the employer both agreed that the claimant never was warned about his late arrivals at work. As a result, this can't be considered willful and substantial misconduct.

The claimant testified that he had been approved for social security disability benefits in October 2014. He also stated that he had recently had surgery on his foot. This raises a substantial issue about whether the claimant is and was able to and available for work. Since this issue has not been adjudicated and was not listed as an issue on the hearing notice, the issue of whether the claimant is able to work and available for work is remanded to the Agency.

DECISION:

The unemployment insurance decision dated October 22, 2014, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The issue of whether the claimant is able to work and available for work is remanded to the Agency.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/ pjs