

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRYANT MCCLOUD
Claimant

APPEAL NO: 16A-UI-06787-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

FERRARA CANDY COMPANY
Employer

OC: 05/29/16
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the June 15, 2016, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 7, 2016. The claimant participated in the hearing. The employer did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time kitchen operator for Ferrara Candy Company from February 22, 2016 to May 26, 2016. He was discharged for exceeding the allowed number of attendance occurrences.

The employer's no-fault attendance policy assigns points to absences. If an employee calls in prior to the start of his shift to report he will be absent that day he receives one point; if he calls in after the start time of his shift he receives one and one-half points; if he is a no-call no-show he receives two points; and if he is tardy or leaves early he receives one-half point.

The claimant injured his back at work around May 12, 2016. On May 25, 2016, he called in and tried to use a personal day because his back was still bothering him but his request was denied and he was assessed one point. The employer told him he had exceeded the allowed number of attendance points and his employment was terminated May 26, 2016.

The claimant does not believe he had more than the eight points allowed prior to termination. He recalls taking two days for bereavement following the death of his uncle, he was ill on another occasion, he was sent home when he injured his back at work in May 2016, and was sent to the employer's physician the following day. He was assessed points for all absences associated with his back injury. He also stated he was absent one day because he went to Des

Moines and admits he was tardy on one occasion. The claimant can only account for six and one-half points instead of the eight required for termination to occur.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (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 claimant cannot recall the dates and/or number of absences he accumulated during his tenure with the employer but does not believe he reached the termination number of eight points.

When misconduct is alleged as the reason for the termination, it is incumbent upon the employer to participate in the hearing to provide evidence of misconduct as is the employer's burden of proof. In this case the testimony provided by the claimant does not meet the definition of disqualifying job misconduct as that term is defined by Iowa law. Because the employer did not participate in the hearing or provide any evidence, it did not meet its burden of proving disqualifying job misconduct. Therefore, benefits are allowed.

DECISION:

The June 15, 2016, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs