

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHASE S BOYER
Claimant

APPEAL NO. 10A-UI-00252-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**SOVERN CONSTRUCTION & HOME
CENTER INC**
Employer

OC: 12/06/09
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated December 30, 2009, reference 01, which found claimant eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 15, 2010. Although duly notified, the claimant did not respond to the hearing notice and did not participate. The employer participated by Tom Sovern, Company President.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Chase Boyer was employed as a full-time carpenter for this company from April 21, 2008 until April 23, 2009 when he was discharged for excessive absenteeism after being warned.

Under company policy employees are subject to discharge if they accumulate 12 or more absences in a year. At the time of discharge Mr. Boyer had been absent on 44 occasions during less than one year of employment; 21 of the claimant's absences were for "personal reasons" unrelated to illness or injury. On two occasions the claimant failed to report or provide notification to the employer. Based upon the claimant's unsatisfactory attendance, he was warned on February 23, 2009 as part of the company's evaluation process.

The decision was made to terminate Mr. Boyer after he called in on April 22 and April 23, 2009 once again indicating he would not be reporting to work for "personal reasons." At the time of discharge the claimant did not dispute his discharge or the reasons for it.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes that the claimant was discharged under disqualifying conditions.

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.

In this matter the employer's witness participated personally and provided sworn testimony testifying that the claimant had been absent on 44 occasions during less than one year of employment and that the majority of the absences were for "personal" non compelling reasons. The evidence in the record establishes that after being warned and continuing to call off work for "personal" reasons, claimant was discharged after he did not report for scheduled work on April 22 and 23, 2009 for non compelling reasons. The Supreme Court of the State of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is a form of misconduct. The Court further held that absence due to illness is deemed excused if the employee properly notifies the employer but absence due to personal responsibility issues is considered unexcused.

There being no evidence to the contrary, the administrative law judge concludes that the employer has sustained its burden of proof in showing the claimant's discharge was disqualifying. Benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated December 30, 2009, reference 01, is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, providing that he is otherwise eligible. The issue of whether the claimant must repay the unemployment insurance benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs