

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LANE B GUTZ
Claimant

APPEAL NO: 06A-UI-08924-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FISERV SOLUTIONS
Employer

OC: 07/30/06 R: 01
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Lane B. Gutz (claimant) appealed a representative's August 30, 2006 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from FiServ Solutions, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 21, 2006. The claimant participated in the hearing. Ann Baur appeared on the employer's behalf and presented testimony from one other witness, Jenny Bailey. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on September 16, 2004. He worked full-time as a technical support analyst in the employer's Cedar Rapids, Iowa, office of its business providing software and software support to the insurance industry. His last day of work was July 14, 2006. The employer discharged him by letter dated July 21, 2006. The reason asserted for the discharge was his absence from work which would be for a then-undetermined time.

The claimant normally worked Monday through Friday, 8:00 a.m. to 5:00 p.m. He was arrested and incarcerated while off duty on July 15, 2006. He was still in custody on July 17, so was a no-call/no-show for work; however, the claimant's attorney contacted the employer shortly before 5:00 p.m. that day to report the claimant's status. The attorney indicated he hoped the claimant would be released by Wednesday. On Thursday, July 20 his attorney again called the employer and reported that the claimant had not yet been released and he was uncertain as to how soon the claimant would be released. The attorney further made the employer aware that upon the claimant's release from custody he would be required to participate in some rehabilitation treatment.

Since the employer had business needs that it determined the claimant could not satisfy and it was unknown how long the claimant would be unable to return to perform his duties, on July 21 the employer determined to discharge him. The claimant did not have any unused accrued vacation available to him; however, he had not had any prior unexcused absences and had not received any warnings for attendance. He was released from custody on or about July 22 and learned that he had been discharged. He did go through some outpatient assessment shortly thereafter which would not have precluded him from working if he were still employed. He was not scheduled to begin an inpatient rehabilitation and treatment program until September 27.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

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.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(7) provides:

- (7) Excessive unexcused absenteeism. 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.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Excessive unexcused absences can constitute misconduct, however, in order to demonstrate the necessary element of intent to establish misconduct, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of his job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The claimant had not previously been warned that future absences could result in termination, which is a necessary component to show intent. Higgins, supra. Nor had the claimant incurred any prior unexcused absences. Through his attorney, he did inform the employer of his situation.

Under the circumstances of this case, the claimant's absence from work the week of July 17, 2006 was an isolated instance. While it was an inconvenience to the employer and the employer had a good business reason for ending the employment so that it could ensure that its business needs would be met, his period of absence that week was not a willful and wanton disregard of the employer's interest or a disregard or violation of known and identified standards

of behavior the employer has the right to expect of its employees. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's August 30, 2006 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/cs