

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RAY G MARTELLE
Claimant

DAVE STASTNY
Employer

APPEAL NO. 12A-UI-03878-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/04/12
Claimant: Appellant (2R)

Section 96.5-2-A – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated April 3, 2012, reference 01, which held that the claimant was not eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 1, 2012. Claimant participated. The claimant was represented by Scott Nelson, attorney at law. The employer participated by Dave Stastny, Human Resources Director, and Mark Griffin, Dubuque Branch Manager. The record consists of the testimony of Dave Stastny; the testimony of Mark Griffin; the testimony of Ray Martelle; and Employer's Exhibits 1-11.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

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

The employer does distribution of heavy duty truck parts and offers repair services. The employer has several branch locations in Iowa. The claimant worked at the branch office in Dubuque, Iowa. The claimant was hired on September 13, 2010. He was a full-time alignment specialist. His last day of work was February 28, 2012. He was terminated on February 29, 2012.

The incident that led to the claimant's termination occurred on February 28, 2012. The claimant had separated his shoulder. This was a non-work-related injury. The claimant was under the care of a chiropractor and had been excused from work on February 9, 2012; February 13, 2012 and February 27, 2012. The claimant returned to work on February 28, 2012. He worked 2.13 hours. He could not continue working due to pain. The employer allowed the claimant to go home. He went to the chiropractor for additional treatment.

The claimant had just finished a three-month probation for attendance from October through December 2011. The employer decided to terminate the claimant due to his attendance.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits 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). Absence due to matters of personal responsibility, such transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984) Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7) In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8) See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988) The employer has the burden of proof to show misconduct.

There is insufficient evidence in this record to show that the claimant was discharged for a current act of misconduct. The claimant was terminated for excessive absenteeism. The employer certainly has the right to implement and enforce an attendance policy. Not every violation of an attendance policy leads to disqualification from receiving unemployment insurance benefits. The final absence must be unexcused in order for there to be a disqualification. In Iowa, an absence for personal illness, properly reported, is considered an excused absence. The claimant's final absence was for personal illness, properly reported. This final absence was therefore excused and cannot constitute a current act of misconduct. Benefits are allowed if the claimant is otherwise eligible.

The claimant's testimony at the hearing raises the issue of whether he is able and available for work since he had ongoing problems with separated shoulder that affected his ability to work. The issue of able and available was not an issue in this hearing. This case is remanded to the Claims Section for a consideration of whether the claimant is able and available for work. He is not disqualified based on the separation.

DECISION:

The decision of the representative dated April 3, 2012, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible. This matter is remanded to the Claims Section for consideration of whether the claimant is able and available for work.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css