

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT D SUMNER

Claimant

APPEAL NO. 11A-UI-13292-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PER MAR SECURITY & RESEARCH CORP

Employer

OC: 03/20/11

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Per Mar Security & Research Corporation filed a timely appeal from a representative's decision dated September 30, 2011, reference 02, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was held November 2, 2011. Claimant participated. The employer participated by Ms. Wendy Larison, Human Resource/Payroll Specialist.

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 all of the evidence in the record, the administrative law judge finds: Robert Sumner was employed by Per Mar Security & Research Corporation from April 21, 2010 until September 10, 2011 when he was discharged for failure to report or provide notification. Mr. Sumner worked as a full-time security officer and was paid by the hour. His immediate supervisor was Mike McElmel.

Mr. Sumner was discharged after he failed to report for scheduled work on the morning of September 9, 2011. The claimant was aware that he was scheduled to work that morning beginning at 5:00 a.m.; however, the claimant was ill and unable to report to work because of his illness. Mr. Sumner attempted to notify the employer of his impending absence but was unable to do so because his cell phone had not functioned and no other phones were available. The claimant also attempted to reach his immediate supervisor "on line" in an effort to report his absence but was unable to make contact. Claimant had not been warned or counseled about unsatisfactory attendance or failure to provide notification prior to the incident in question. The claimant had been warned by the company for other matters on two occasions.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is not.

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.

The employer has the burden of establishing disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants the denial of unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial."

The Supreme Court in the State of Iowa indicates in Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) that excessive unexcused absenteeism is one form of job misconduct. The Court held that the absences must both be excessive and unexcused and that the concept included tardiness, leaving early, etc. The Court further held that absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. In this case the evidence establishes that the circumstance of sudden illness and

unexpected inability to use the telephone caused the claimant to oversleep and the claimant made a reasonable attempt to find other means of notifying the employer of his illness and inability to report.

The Court in the case of Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989) held a single unexcused absence does not constitute misconduct even in a case where the worker disregarded specific instructions to provide notice.

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be placed upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

While the decision to terminate Mr. Sumner may have been a good decision from a management viewpoint, for the above-stated reasons the administrative law judge concludes that the circumstances of the claimant's absence on September 9, 2011 and his inability to provide notice do not rise to the level of intentional disqualifying misconduct sufficient to warrant the denial of unemployment insurance benefits. Benefits are allowed, providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated September 30, 2011, reference 02, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs