

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THOMAS P FLANNAGAN
Claimant

APPEAL NO. 07A-UI-11289-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXIDE TECHNOLOGIES
Employer

**OC: 11/04/07 R: 04
Claimant: Appellant (1-R)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Thomas Flannagan (claimant) appealed a representative's December 3, 2007 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he voluntarily quit work with Exide Technologies (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for December 20, 2007. The claimant participated personally. The employer participated by Mark Van Lauwe, Human Resources Manager, and Brenda Saunders, Occupational Health Nurse. The claimant offered and Exhibit A was received into evidence.

ISSUE:

The issue is whether the claimant voluntarily quit work without good cause attributable to the employer.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on April 27, 1981, as a full-time paste mix operator working third shift. The claimant was involved in an automobile accident in early January 2007. He was absent from work for twelve weeks and used Family Medical Leave. The employer requested that the claimant stay in contact with it so it could arrange its work schedule. The claimant did not.

He did not answer the messages the employer left on the claimant's answering machine. The claimant returned to work on April 9, 2007, and worked for 30 days. The claimant was absent from June 16 through 18, 2007. The claimant tripped and fell in a non-work-related accident and injured his hand on July 22, 2007. He was absent through August 20, 2007. The employer telephoned him many times requesting a status update. The employer asked the claimant to provide doctor's excuses personally. The claimant did not provide the needed information until after repeated requests. On August 15, 2007, the claimant's son provided a doctor's excuse. The employer asked the son if the claimant was in town and the son said he was. Shortly thereafter, the claimant telephoned the employer complaining about the employer's treatment of

his son. The employer requested the claimant provide all doctor's excuses personally and keep in constant contact with the employer.

The claimant returned to work for August 21 and 22, 2007. On August 22 and 23, 2007, the claimant left voice messages for the employer indicating he would not be at work for a long period of time because of his hand. When the Occupation Health Nurse did not return his call on August 23, 2007, he called her at home at 10:30 p.m. He called her at an inconvenient time for her because the employer had inconvenienced him by calling in the daytime. The claimant had his wife drop off a doctor's note at work. The employer left numerous messages for the claimant. The claimant did not stay in contact with the employer. On September 7, 2007, the employer sent the claimant a letter offering him various jobs. The claimant did not respond. After he saw his physician on September 12, 2007, he had his wife drop off the slip on September 13, 2007.

On October 17, 2007, the employer sent the claimant a certified letter terminating him for excessive absences. The employer would not have terminated the claimant if he had stayed in contact with the employer and provided doctor's excuses personally.

On October 31, 2007, the claimant's physician indicated the claimant could not work with his left hand.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for misconduct.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was an improperly reported illness that lasted from August 23 through October 17, 2007. The employer requested repeatedly that the claimant personally stay in contact with the employer. The claimant disregarded this request. The claimant's absence does amount to job misconduct because it was not properly reported and the claimant failed to follow the employer's instructions. The claimant was discharged for misconduct. He is not eligible to receive unemployment insurance benefits.

The issue of whether the claimant is able to work is remanded for determination.

DECISION:

The representative's December 3, 2007 decision (reference 01) is affirmed. The claimant is not eligible to receive unemployment insurance benefits, because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible. The issue of whether the claimant is able to work is remanded for determination.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw