

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES F COWLING
Claimant

APPEAL NO. 09A-UI-07542-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAREWAY STORES INC
Employer

OC: 04/12/09
Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Fareway, filed an appeal from a decision dated May 15, 2009, reference 03. The decision allowed benefits to the claimant, James Cowling. After due notice was issued a hearing was held by telephone conference call on June 9, 2009. The claimant did not provide a telephone number where he could be contacted and did not participate. The employer participated by Human Resources Representative Kim Garland, and Meat Department Manager Kent Manternach.

ISSUE:

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

FINDINGS OF FACT:

James Cowling was employed by Fareway from November 10 until November 29, 2008 as a part-time meat cutter. He had missed two days of work the second week of his employment and Meat Department Manager Kent Manternach spoke with him about “keeping motivated” and doing his job.

On November 28, 2008, the day after Thanksgiving, the claimant called in saying he would be absent due to illness, that his entire family was sick that day and staying home. But later in the day Mr. Manternach went to the local Wal-Mart to do a price check, and saw the claimant’s sister working at her job there. The next day the claimant came in to get his check and was discharged by the meat department manager, who told him it “was not working out.”

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.

The employer has the burden of proof to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). In the present case the employer based the decision to discharge on the fact the claimant called in sick and on the same day his sister was seen working at her regular job. While it was certainly questionable the claimant would assert his entire family was ill, Mr. Manternach did not question the sister about her being able to work when her brother was not. He did not question the claimant about the inconsistencies in his statement and allow him the opportunity to explain before discharging him the next day.

It would be a different situation if the claimant himself was seen by Mr. Manternach out and about in town, doing things which were inconsistent with purportedly being ill. But as this is not the case the administrative law judge cannot conclude the employer has met its burden of proof to establish the claimant was discharged for substantial, job-related misconduct as a properly reported illness cannot be considered misconduct as it is not volitional. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982).

DECISION:

The representative's decision of May 15, 2009, reference 03, is affirmed. James Cowling is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs