

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRET WEBB**  
Claimant

**APPEAL NO: 12A-UI-11452-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GEHRKE INC**  
Employer

**OC: 02-19-12**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the September 19, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 5, 2012. The claimant participated in the hearing. Bob Gehrke, president, participated in the hearing on behalf of the employer.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time backhoe operator for Gehrke Inc. from the fall of 2008 to August 28, 2012. The employer terminated his employment for tardiness but could not provide any dates or times when the claimant was tardy. The claimant stated he was tardy approximately four times between June and August 2012. He stated he was tardy June 27 or 28, 2012, because he overslept. The employer, who is his step-father, went to his house and woke him up and told him he could not continue to be tardy or he would lose his job. He was tardy an estimated two additional dates before oversleeping again August 27, 2012. The employer decided he “had enough” and terminated the claimant’s employment August 28, 2012. The employer is a small business and does not issue written warnings, but did give the claimant verbal warnings. The claimant did not have a full-day absence during his tenure with the employer.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). The employer agrees with the claimant's estimate that he was tardy on four occasions between the beginning of June and the end of August 2012. While tardiness is not acceptable, the claimant did not have any other absences during his four years with the employer and there is no evidence of a pattern of unexcused absenteeism. Under these circumstances, the administrative law judge must conclude the claimant's attendance does not rise to the level of excessive unexcused absenteeism as that term is defined by Iowa law. Therefore, benefits must be allowed.

**DECISION:**

The September 19, 2012, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/kjw