

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GENE L ARMSTRONG
Claimant

APPEAL NO. 12A-UI-02395-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CONSTRUCTION PRODUCTS INC
Employer

OC: 01/08/12
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Disciplinary Suspension/Misconduct

STATEMENT OF THE CASE:

Construction Products (employer) appealed a representative's February 28, 2012 decision (reference 01) that concluded Gene Armstrong (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for March 27, 2012. The claimant participated personally. The employer participated by Josh Gorman, Human Resource Administrator.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on June 7, 2010, as a full-time receiving clerk. The employer has a handbook but the claimant did not receive a copy. The handbook contains a no fault attendance policy. If an employee accumulates three written warnings during a 12-month rolling period, the employee will be suspended for 25 days.

The employer issued the claimant a written warning on February 2, 2011, for absenteeism. The claimant was absent due to child care issues. On March 21, 2011, the employer issued the claimant a second written warning for attendance. The claimant was absent due to jury duty for three days. The employer expected the claimant to work his second shift hours, starting at 2:30 a.m., and then report for jury duty at 8:00 a.m. The employer notified the claimant that further infractions could result in termination from employment.

The claimant properly reported absence due to illness on December 12, 2011. On January 3, 2012, the employer issued the claimant a written warning for his absence and a 25-day suspension. The claimant was suspended without pay from January 3 through February 7, 2012. He filed for unemployment insurance benefits with an effective date of January 8, 2012.

REASONING AND CONCLUSIONS OF LAW:

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

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(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the suspension. The last incident of absence was a properly reported illness which occurred on December 12, 2011. The claimant's absence does not amount to job misconduct because it was properly reported. In addition, the employer waited until January 3, 2012, to separate the claimant for employment. No good cause was given for the delay in separation. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the suspension. The claimant was suspended but there was no misconduct.

DECISION:

The representative's February 28, 2012 decision (reference 01) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css