

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RAY C OHL
Claimant

APPEAL NO. 11A-UI-15423-A

**ADMINISTRATIVE LAW JUDGE
DECISION**

**MID-STATES MILLWRIGHT & BUILDERS
INC**
Employer

OC: 10/23/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
871 IAC 24.32(8) – Current Act of Misconduct

STATEMENT OF THE CASE:

Ray C. Ohl filed a timely appeal from an unemployment insurance decision dated November 29, 2011, reference 02, that disqualified him for benefits. After due notice was issued, a hearing was held in Des Moines, Iowa on March 30, 2012. Mr. Ohl participated on his own behalf and was represented by Bruce H. Stoltze, Jr., Attorney at Law. Josh Langhwoldt testified for the claimant. Ben P. Roach, Attorney at Law, appeared on behalf of the employer, Mid-States Millwright & Builders, Inc. Human Resource Manager and Safety Director Dale Erickson testified. Employer Exhibits A, B, and C and Claimant Exhibits Three and Four were admitted into evidence.

ISSUE:

Was the claimant discharged for disqualifying misconduct?

FINDINGS OF FACT:

Ray C. Ohl was employed by Mid-States Millwright & Builders, Inc. from September 13, 2010 until October 19, 2011. He last was employed as a shop worker. On Wednesday, October 19, 2011, General Manager Brian Ryerson told Mr. Ohl and co-worker, Josh Langhwoldt, that they were being laid off because of a lack of work. Mr. Ryerson gave Mr. Ohl a copy of his business card and a company sweatshirt. Mr. Ryerson did not indicate that the separation was due to prior absences.

Mr. Ohl was a part-time employee during the school year. His work schedule was set up to accommodate his class schedule. Mr. Ohl was not scheduled to work on Tuesday, October 18, 2011. He had missed work on various occasions in April, May and June 2011.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in this record establishes that the claimant was discharged for misconduct in connection with the employment. It does 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 proof. See Iowa Code § 96.6-2. Among the elements it must prove is that the final incident leading directly to the discharge was a current act of misconduct. See 871 IAC 24.32(8).

The employer could have called Mr. Ryerson to testify but chose not to do so. Mr. Erickson's testimony was based on information he had received from Mr. Ryerson. Hearsay evidence such as this is admissible in a contested case proceeding. The administrative law judge, however, is not required to give it the same weight as sworn testimony from firsthand witnesses.

The employer has not established that Mr. Ohl was absent for a personal reason on October 18, 2011. Even if some of Mr. Ohl's prior absences would be considered unexcused for unemployment insurance purposes, the absence of a final, current act of misconduct means that no disqualification may be imposed. Furthermore, the employer has not even established that the separation was a discharge rather than a layoff. The testimony of Mr. Ohl and Mr. Lanhwoldt given under oath and subject to cross-examination is more credible than the hearsay testimony of the employer witness.

Based upon the evidence in this record, no disqualification may be imposed.

DECISION:

The unemployment insurance decision dated November 29, 2011, reference 02, is reversed. The claimant is entitled to receive unemployment insurance benefits, provided he is otherwise eligible.

Dan Anderson
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs