

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEFFREY J WILEN
Claimant

APPEAL NO. 12A-UI-07310-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS ENTERPRISES INC
Employer

OC: 05/27/12
Claimant: Appellant (2)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Jeffrey Wilen, filed an appeal from a decision dated June 15, 2012, reference 01. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on July 31, 2012. The claimant participated on his own behalf and with Jessica Wilen. The employer, Wells Enterprises, Inc. (Wells), participated by Human Resources Business Partner Mark McCarty and was represented by TALX in the person of Tom Kuiper.

ISSUE:

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

FINDINGS OF FACT:

Jeffrey Wilen was employed by Wells from May 9, 2005 until May 24, 2012 as a full-time command center technician. The employer's attendance policy is no-fault and maintained on a point system. Ten points accumulated in a rolling 12-month period is grounds for discharge.

Mr. Wilen received a written warning April 18, 2012, when he had accumulated eight points. One was for two incidents of tardiness and the others were due to personal illness or illness of his children. He was absent due to personal illness on May 20, 21, and 22, 2012, and called in each day to report his absence. This put him at 10.5 points and he was discharged on May 24, 2012, by Human Resources Business Partner Mark McCarty.

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.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The claimant was discharged for absenteeism. In order to be disqualified from receiving unemployment benefits the absences must be unexcused and there must be a current, final act of misconduct under 871 IAC 24.32(8). But a properly reported illness cannot be considered misconduct as it is not volitional. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The final absences, indeed most of Mr. Wilen's absences, were due to illness and were properly reported, including the final three days. There was no current, final act of misconduct and disqualification may not be imposed.

DECISION:

The representative's decision of June 15, 2012, reference 01, is reversed. Jeffrey Wilen is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css