

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICK A MCLEMORE
Claimant

APPEAL NO. 07A-UI-06222-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LABOR READY MIDWEST INC
Employer

OC: 05/20/07 R: 12
Claimant: Appellant (2/R)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Rich A. McLemore (claimant) appealed a representative's June 15, 2007 decision (reference 03) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment his from Labor Ready Midwest, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 10, 2007. The claimant participated in the hearing. Dawn Brooks appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant began taking assignments with the employer on January 4, 1999. After some breaks in taking assignments, he resumed taking assignments in July 2006. On May 23, 2007, he was given an assignment to begin that day and continue into May 24. He worked the assignment on May 23, but did not report for the work on May 24. The claimant's car had broken down on his way to the assignment. By the time he could contact the employer, the employer had filled the assignment with someone else and he was told to return on May 25 for another assignment.

On May 25 the claimant reported to the employer and was given a long-term assignment that began that day, which he has remained working through the date of the hearing.

The claimant established an unemployment insurance benefit year effective May 20, 2007. Although the claimant had wages for work performed on May 23 and May 25, he reported no wages when he made his weekly claim for the week ending May 26. Likewise, he reported no wages for the week ending June 2. For the weeks thereafter, the claimant has reported some wages, ranging from \$100.00 to \$250.00 per week; the information from the employer suggests

the actual gross amount of wages earned by the claimant may be different from the amounts reported.

REASONING AND CONCLUSIONS OF LAW:

The question is whether there was a disqualifying separation from employment. Essentially, the issue in this case is whether the employer or the business client ended the claimant's assignment and effectively discharged him for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer or client was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

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 reason the employer was forced to discharge the claimant from his assignment was his failure to report for work on May 24. In order to be misconduct, absenteeism must be both excessive and unexcused. The record does not establish that the claimant's absences were both excessive and unexcused. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's absences do not establish his actions were misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

An issue as to whether the claimant has properly reported his gross wages earned during his benefit weeks arose during the hearing. This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

DECISION:

The representative's June 15, 2007 decision (reference 03) is reversed. The claimant did not voluntarily quit and the employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the weekly claim wage issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw