

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WAYNE SCHUMACHER
Claimant

APPEAL NO. 13A-UI-08335-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SUBURBAN CONSTRUCTION INC
Employer

OC: 01/27/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated July 16, 2013, reference 04, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on August 20, 2013. The parties were properly notified about the hearing. The claimant participated in the hearing. Darin Wilson participated in the hearing on behalf of the employer. Exhibits One and Two were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time as a window and siding crewmember for the employer from July 16, 2012, to June 26, 2013. He was informed and understood that under the employer's work rules, frequent absence or tardiness would result in discipline, employees were required to notify the employer if they were not able to work as scheduled, and an employee who failed to notify the employer about an absence could be discharged. It was acceptable to call the vice president, Darin Wilson, and leave a message to call off work.

The claimant was absent due to illness on 21 days from September 4 through March 28, 2013, with proper notice to the employer. He properly notified the employer about his absences. He was absent from work without notice to the employer on February 27. The claimant received a final written warning about being absent without notice on February 28. He received a final warning about missing an unacceptable amount of work on March 28.

The claimant was absent due to illness with proper notice to the employer on May 1 and June 21. He was absent due to having a court appearance on May 3 with proper notice to the employer.

On the morning of June 24, the claimant questioned whether the employer was working or not because it was raining and the forecast was for thunderstorms that day. The normal practice was that the employer would call or text employees if there was no work due to weather

conditions. There had been times when the claimant had called in and was told there was no work, and once when he reported to work and was sent home due to weather conditions. On June 24, however, the claimant's phone was shut off so he went to a coworker's house to call Wilson to find out if there was work that day. The coworker, Henry Wiese, had already called in sick that day. The claimant called Wilson's cellphone and left a message because Wilson did not answer. In the first message, the claimant told Wilson that he was giving Wilson a call because he doubted that they were working that day. He waited awhile for a response and then called again and left a second message stating that he was double-checking about whether there was work because he did not want to drive to work for nothing. He told Wilson that he would see him on June 25. Later that morning, Wilson called Wiese to ask him if he knew where the claimant was. Wiese told Wilson that the claimant had tried calling him earlier to find out if they were working. Wilson did not listen to the claimant's voice mail messages until later. Only the claimant and Wilson did not work on June 24.

A major storm hit the Quad City area on the afternoon of June 24, with heavy rain and lightning. There were major power outages through the area through overnight. The claimant's power went out and he had water in his basement. He had carpet and furniture that needed to be moved. On the morning of June 25, the claimant called Wilson and left a message that he would not be reporting to work because his power had gone out and there was water in his basement.

When the claimant reported to work on June 26, 2013, the employer discharged him for his excessive absenteeism and for failing to report that he would not be at work on June 24.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (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 unemployment insurance rules provide: "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." 871 IAC 24.32(8).

The unemployment insurance rules provide: "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." 871 IAC 24.32(7).

Nearly all of the claimant's absences were due to illness and were properly reported. While the employer may be justified in terminating an employee who is repeatedly sick and unable to work, this does not amount to disqualifying misconduct if the claimant notifies the employer about the illness.

The crux of this case then is the absence on June 24. I believe the claimant's testimony that there was severe weather in the area on June 24. The employer's witness, Henry Wiese confirmed that it was raining and his power was knocked out that afternoon. While the normal practice was that employees would be called or receive a text if there was no work, in this case, the claimant could not have received such a message because his phone was shut off. That is why he went to Wiese's house early in the morning to call Wilson. The claimant called Wilson twice early in the morning on June 24 and left messages for him. Wilson acknowledged that it was permissible to leave a message on his voice mail when an employee is calling in. Wilson considered the claimant to be a no-call because the messages left were about whether they were working that day rather than a message that the claimant was not reporting to work. In this case, the evidence fails to show the claimant committed intentional misconduct. He made an error in judgment by not going into work when he could not get ahold of Wilson, but the error did not rise to the level of intentional misconduct.

DECISION:

The unemployment insurance decision dated July 16, 2013, reference 04, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css