

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERRY A LAU
Claimant

APPEAL NO: 09A-UI-06577-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DECKER TRUCK LINE INC
Employer

OC: 03/29/09
Claimant: Appellant (2)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Terry A. Lau (claimant) appealed a representative's April 16, 2009 decision (reference 01) that concluded he was not qualified to receive benefits, and the account of Decker Truck Line, Inc. (employer) would not be charged because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 26, 2009. The claimant participated in the hearing. John Fatino, Attorney at Law, represented the employer. Jeremiah Rossmanith, the terminal manager, and Sandy Loney 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:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on March 1, 2002. The claimant worked full-time on second shift as the tractor shop foreman.

Prior to 2005, the employer suspended the claimant for attendance problems. In 2008, the claimant notified the employer he was unable to work on February 18 to 20, May 12, July 13 and November 13 and 14. In November 2008, Rossmanith talked to the claimant about making last minute time-off requests and reporting to work late. In January 2009, the claimant suggested that he start his shift at 4:00 p.m. instead of 3:00 p.m. The employer authorized this change.

The claimant was absent on February 9, 2009. As a result of the claimant's job responsibilities, Rossmanith asked the claimant to contact him directly when he was ill and unable to work. The claimant understood he was to call Rossmanith's cell phone when he was unable to work. On March 19, the claimant notified the employer he was ill and unable to work. The claimant did not sleep the evening of March 19. About 12:30 p.m., the claimant called Rossmanith's cell

phone. Rossmanith did not answer his cell phone so the claimant left a message that he was still ill and unable to work on March 20, 2009. The claimant then went to bed and fell asleep.

Rossmannith called the claimant at 4:21 p.m. to let him know he needed to bring a doctor's release before he could return to work. Rossmannith's call woke up the claimant. The claimant was upset that Rossmannith woke up him to tell him he needed a doctor's release. The claimant made the comment, "Kiss my ass." Rossmannith heard the claimant mumble and understood the claimant to say the F word. The claimant said he would bring in a doctor's release. The claimant brought the employer a doctor's release.

On March 24, 2009, the employer discharged the claimant for insubordination and poor work performance. The employer considered the claimant's comments during the March 20 phone conversation as insubordination.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. 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 (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 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).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

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 law presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7).

The facts establish that since 2005 the employer has not given the claimant any written warnings or suspended him for attendance issues. The employer may not have been satisfied with the claimant's attendance, but the situation did not prompt the employer to give the claimant a written warning or a suspension as he had received before. When the employer discharged the claimant, excessive absenteeism was not major problem either. On March 19 and 20, the claimant notified the employer that he was ill and unable to work. The situation that

resulted in the claimant's discharge occurred during the 4:20 p.m. phone conversation between the claimant and Rossmanith.

When Rossmanith called at 4:20 p.m., he had no idea the claimant was sleeping. The phone call, however, woke up the claimant. Since the claimant was ill and had not slept the night before, he was upset when Rossmanith woke him up at 4:21 p.m. Whether the claimant said, "F you," or "Kiss my ass," either comment was inappropriate. Rossmanith did not say anything about the language the claimant used during the conversation. Instead, he just repeated that the claimant needed to bring a doctor's release before he could return to work. The claimant acknowledged he would bring the release and did so. The question becomes whether the claimant's comment during the March 20 phone conversation amounts to work-connected misconduct. Under the facts of this case, ill and being woken up, this isolated incident does not rise to the level of work-connected misconduct. Therefore, the claimant is qualified to receive benefits as of March 29, 2009.

DECISION:

The representative's April 16, 2009 decision (reference 01) is reversed. The claimant's March 20 comments were inappropriate but the comments do not rise to the level of work-connected misconduct. As of March 29, 2009, the claimant is qualified to receive benefits provided he meets all eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css