

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LARRY A DYER
Claimant

APPEAL NO. 14A-UI-03123-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

AT & T MOBILITY SERVICES LLC
Employer

OC: 02/23/14
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Larry Dyer (claimant) appealed a representative's March 13, 2014, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with AT & T (employer) for excessive unexcused absenteeism and tardiness after being warned. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for April 30, 2014. The claimant participated personally. The employer was represented by Jenna Clark, Hearings Representative, and participated by Nicole Slavish, Team Manager, and Michael Kelly, Quality Assurance Manager. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 8, 2008, as a full-time customer service representative. The claimant signed for receipt of the employer's handbook on August 19, 2008. The employer issued the claimant written warnings on June 14, July 5, 10, 31, August 19, September 9, and 30, 2013, for attendance issues. Four of the absences were properly reported and due to medical issues. The claimant was tardy three times due to traffic problems. The employer notified the claimant in each warning that further infractions could result in termination from employment. On January 31, 2014, the claimant's alarm on his cell phone malfunctioned and the claimant overslept. The claimant notified the employer the reason for his tardiness. On February 17, 2014, the employer terminated the claimant for excessive absenteeism. The employer waited seventeen days to terminate the claimant to see if the claimant would provide a doctor's note for his tardiness.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. 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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer occurred on January 31, 2014. The claimant was not discharged until February 17, 2014. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge and disqualification may not be imposed.

DECISION:

The representative's March 13, 2014, decision (reference 01) is reversed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs