

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID A RINGEN

Claimant

APPEAL NO. 10A-UI-09877-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SSW ENTERPRISES INC

Employer

OC: 06/20/10

Claimant: Appellant (2)

Section 96.5-2-a - Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated July 9, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 30, 2010. Claimant participated. Employer participated by Michelle Anderson, human resources coordinator. The record consists of the testimony of Michelle Anderson.

Although the claimant responded to the hearing notice and provided a telephone number at which he could be reached, he was at work and using a cell phone. The cell phone did not provide reliable service. The claimant had to be called several times during the hearing because he dropped out of the call. The last time this occurred, the administrative law judge was unable to reach the claimant. The administrative law judge was unable to take testimony from the claimant.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer manufactures refrigerator shelves and freezer baskets at its manufacturing facility in Clinton, Iowa. The claimant was a full time resistance welder operator. He was initially hired on February 25, 2010, and terminated for excessive absenteeism on April 30, 2010. The employer agreed to give the claimant a second chance and he was rehired on May 10, 2010, with the understanding that during his new probationary period he would have perfect attendance.

On June 3, 2010, the claimant was given performance counseling by the employer. He was told that he had a poor attitude and was argumentative with co-workers and supervisors. On June 18, 2010, the claimant called in sick. He did comply with the employer's notification policy.

However, since the claimant had violated his agreement that he would have perfect attendance, coupled with his poor attitude, the employer terminated the claimant's employment on June 18, 2010.

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Absence due to illness and other excusable reasons is deemed excused if the employee properly notified the employer. See Higgins, supra, and 871 IAC 24.32(7). The employer has the burden of proof to show misconduct.

The final incident that led to the claimant's termination occurred on June 18, 2010, when the claimant called in sick. In order to disqualify the claimant from receiving benefits, this incident must be misconduct. Iowa law is clear that if an employee is sick and unable to work and properly notifies the employer, there is no misconduct. This is true even if all of the claimant's

previous absences were unexcused and the claimant's attitude on the job was also part of the decision to terminate the claimant. Since there is no current act of misconduct, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated July 9, 2010, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs