IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHRISTOPHER JONES
Claimant

IOWA LOADING SERVICES LTD
Employer

APPEAL NO. 08A-UI-07197-BT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/25/07 R: 03
Claimant: Appellant (1)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Christopher Jones (claimant) appealed an unemployment insurance decision dated August 4, 2008, reference 04, which held that he was not eligible for unemployment insurance benefits because he was discharged from Iowa Loading Services, Ltd. (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 25, 2008. The claimant participated in the hearing. The employer participated through Clayton Fisk, Director of Safety, and Corey Vesely, Operations Supervisor. Employer's Exhibits One through Five were admitted into evidence. 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:

The issue is whether the employer discharged the claimant for work-related misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed as a full-time general laborer from November 8, 2007 through July 1, 2008, when he was discharged for attendance, a lack of effort, and a repeated failure to follow directives. He was hired as a shag driver and caused problems during his first month of employment by making racial comments in the shag van where he was working. The claimant told his co-workers it was their fault that they were born white and he frequently used the "N" word in conversation. Consequently, he was removed from the van and moved to the rail crew to help secure tractors. The claimant did not load the rail cars but mostly secured the tractors with chains. After four weeks of working on the rail, he told the employer he was not able to perform these job duties due to a previous knee surgery. The claimant certified on his employment application that he was physically capable of performing heavy manual work but now claimed he was unable to do so. The employer then moved him to do load inspections and trained him to fill out the inspection forms for each load. Initially he performed well, but as the weather became worse and the truck traffic increased, the claimant's performance declined. His inspection forms would be incomplete or he would not do them at all. After five weeks, it was requested that someone else do that job and the claimant

was moved back to the shag van to drive tractors. He worked in this position until February 6, 2008, when he went to dispatch.

The claimant requested to go to dispatch and Vice-President Craig Cory agreed to give him a trial basis of three weeks. On February 6, 2008, he was initially assigned to work the night and weekend shift with dispatch supervisor Tim Carey, who would train him. The claimant was ambitious at first, but that diminished the longer he worked in dispatch. He was doing "call aheads", performing simple check calls, and entering loads. Shortly after the dispatchers went over the computer programs with him, the claimant repeatedly asked which program he needed to use. When the claimant finished a task, he was content to sit there without asking what else needed to be done. Mr. Cory reviewed the programs with the claimant and had him write down what computer programs went with each function. Mr. Cory told the claimant that the feedback from the other dispatchers was that he was not catching on to some of the easy tasks. The claimant denied that he was having problems and asked for more time. The next day, the claimant became upset and yelled at supervisor Jeff Heideman when Mr. Heideman told him to stop playing around and get to work. The claimant was using his cell phone and the internet after he finished a task.

Mr. Cory moved the claimant to the van division to get other employees' opinions about the claimant's capabilities. Mr. Cory subsequently asked Fleet Manager Joe Steffen how the claimant was doing and Mr. Steffen reported that the claimant did not seem to remember things and repeatedly asked how to look up the same information on the computer. Mr. Cory saw Vice-President Jim Schuman helping the claimant and later asked Mr. Schuman about the claimant's performance. Mr. Schuman also indicated the claimant was just not catching on. Mr. Cory talked to the claimant, who denied Mr. Schuman had helped him even though Mr. Cory personally observed it. The claimant was moved to the brokerage area to get some help with the computer programs. Brokerage Manager Ken Wymore evaluated the claimant and reported that the claimant was nice enough but not ready to move into a dispatch position or on salary. Mr. Cory told the claimant he was not ready to move to dispatch but could continue working in brokerage in the afternoons and assisting the night dispatch. The claimant worked in dispatch from the beginning of February 2008 through mid May 2008.

The claimant had attendance issues that did not improve. He told Mr. Carey that he wanted to come to work on February 10, 2008 but did not report to work that morning. Mr. Carey called him and the claimant said he forgot to set his alarm and changed his mind about coming in. The claimant did not work on February 15, 2008 because he said his mother had a small stroke and he would be at the hospital with her. He asked if he could be late returning from lunch on February 21, 2008 because his sister just had a baby. He returned at 5:45 p.m. but had to have Mr. Cary sign his attendance card since he forgot to punch out. This had been a continual issue and Mr. Carey indicated that there was just as much ink on the last time card as there were punch times. With regard to another issue, the claimant was advised he was spending too much time on his cell phone and it needed to stop.

The claimant called in sick on February 22, 2008. On February 23, 2008, Mr. Cory had to remind him to take his lunch hour so he was back by noon. The claimant sent Mr. Carey a text message on February 27, 2008 to say that he had car problems and asked for the day off work. He was told to get to work as soon as he could and arrived at approximately 2:00 p.m. There was an additional incident on February 29, 2008 when he worked the late shift and punched out for lunch at 4:00 p.m. He should have been back by 5:00 p.m. but sent Mr. Cory a text message stating he would be late because he was buying a new car. Mr. Cory called him and told him it was unacceptable and that it should have been done on his own time. Mr. Cory also told the claimant he was not acting as if he wanted to be switched to salary when he could not

be at work or arrive on time. On March 1, 2008, the claimant left at 11:25 a.m. and returned at 12:40 p.m. He claimed he left at 11:40 a.m. but was again advised he needed to be leaving for lunch by 11:00 a.m. He failed to punch out for lunch on March 2, 2008 but punched in from lunch and then failed to punch out at the end of the day.

Mr. Carey emailed Mr. Cory on March 2, 2008 that it would not be a good idea to switch Chris to salary at that time and he should not be given any kind of a pay raise until he demonstrated he could be at work every day and on time. The claimant called on March 12, 2008 and said he could not work due to asthma. He assured the employer he would work on March 16, 2008 to make up the time but failed to do so. Mr. Carey sent Mr. Cory another email raising concerns about the claimant's ridiculous attendance issues. Additionally, Mr. Carey reported that the claimant was not advancing, as he "asked the same questions about the same things nearly every night." The same response came from the machinery dispatch, who reported the claimant spent chunks of time on personal calls and logged out of the queue until someone caught him doing nothing. The claimant had lost his enthusiasm and made no effort to learn and improve.

After he left for his lunch hour on March 25, 2008, the claimant called Mr. Carey to say his mother had gone to the hospital. He was gone for the rest of his shift. He told the employer on March 29, 2008 that he would be gone a couple hours to get his mother settled in the care facility. He left at 11:00 a.m. and did not return to work. The claimant called on April 4, 2008 and said that he was going to the hospital for his asthma. Mr. Carey left a message for the claimant to contact him or Mr. Cory when he knew what was going on. The claimant's girlfriend left a message that the claimant had an asthma attack while walking the dog. He came in two hours late on April 29, 2008 stating that he had to watch his sister's kids. He was late coming back from lunch on May 2, 2008 because he said he ripped his pants and had to go home to change. The claimant was one and one half hours late on May 3, 2008 and again called in sick on May 6, 2008.

Everyone in dispatch had to go through hazardous materials training in May 2008 and the claimant was given most of a Saturday to complete the training. He subsequently told Mr. Carey that he completed the training and passed the test. Mr. Carey heard the following week that although the claimant had completed the training, he had not passed the test. Mr. Carey questioned whether the claimant did not think it mattered or whether he thought the employer would simply not notice. The claimant was late on May 21, 2008 and missed work on June 17, 2008. He did not work on June 23 and 24, 2008 because he told Mr. Vesely that he would have to be fired before he would do the kind of work he had been doing for $8.00 per hour. He said that he was not going to do anything for that kind of money. He worked on June 25, 2008 but called Mr. Vesely a half hour after his scheduled start time and said that he would be in around 11:00 a.m. because he had to go to court with his brother. He arrived at work shortly before 1:00 p.m. and left by 4:30 p.m.

Mr. Carey reported that while some of the claimant's absences might have been necessary, the sheer volume of time lost and apparent lack of concern on his part was disturbing. His poor attendance was discussed multiple times but the employer did not see much in the way of tangible improvement. He further added, "Information retention did not cease to be a problem. Eventually his continual absences became a distraction, and need for constant close supervisor to be walked step by step through a lot of procedures became counterproductive. We were never comfortable enough with Chris' progression to move him to the schedule we wanted him on."

On June 26, 2008, the claimant was parking 9000 track tractors worth approximately $250,000.00. It was reported by a co-worker that he was cutting doughnuts and spinning the

units into location. Operations Supervisor Corey Vesely went out to the lot to find out what was going on and saw skid marks around the tractors that the claimant parked. Mr. Vesely asked the claimant if he was "turning doughnuts" and he denied it, but the other drivers confirmed that he was. Each track is worth approximately $15,000.00 per side and Mr. Vesely took pictures of the skid marks the claimant had made. There were no skid marks around the other units that had been moved. Mr. Vesely told the yard supervisor to take the claimant back to the dock to punch out and that he was done driving tractors. The claimant asked the yard supervisor if the operations supervisor said he was done driving tractors and when he was told yes, the claimant said, "Fuck him." The claimant was subsequently terminated after he was a no-call/no-show on July 2, 2008 and July 3, 2008.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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 § 96.5-2-a.

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.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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.

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 claimant was discharged for an intentional lack of

effort, a repeated failure to follow directives, and excessive unexcused absenteeism. Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The claimant had demonstrated a strong pattern of ignoring the employer's directives and acting in his personal interests that were contrary to the employer's interests. He was repeatedly warned about his attendance, but it did not improve. Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The claimant concluded his employment with this employer, who went above and beyond what most employers would have done to train him, by failing to call or report to work for two consecutive days. Two consecutive no-call/no-show absences can constitute job misconduct. Boehm v. IDJS, (Unpublished, Iowa App. 1986). The final absences, in combination with the claimant's history of absenteeism, are considered excessive. The claimant's conduct shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated August 4, 2008, reference 04, is affirmed. The claimant is not eligible to receive unemployment insurance benefits, because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Susan D. Ackerman
Administrative Law Judge

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Decision Dated and Mailed

sda/kjw