

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIE E HILL
Claimant

APPEAL NO: 11A-UI-02345-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERISERVE INTERNATIONAL INC
Employer

OC: 01/23/11
Claimant: Appellant (2)

Iowa Code § 96.5(2)a - Discharge

PROCEDURAL STATEMENT OF THE CASE:

The claimant appealed a representative's February 21, 2011 determination (reference 01) that disqualified him from receiving benefits and held the employer's account exempt from charge because he had been discharged for disqualifying reasons. The claimant participated in the hearing. Tim O'Hara and Lisa Hagan appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge finds the claimant qualified to receive benefits.

ISSUE:

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

FINDINGS OF FACT:

The claimant started working for the employer in August 2009. He worked as a full-time client service representative. Hagan became the claimant's supervisor in December 2010.

On November 5, 2010, the claimant received a written warning for attendance issues. The warning reminded the claimant that the employer's policy requires employees to contact their supervisor when there is any change in a schedule and when an employee is late or absent from work. The employer's policy indicates an employee's failure to notify a supervisor when there is a deviation from a scheduled work shift and/or excessive absenteeism may result in disciplinary actions including termination. The employer defines excessive tardiness as more than one occurrence in a one-month period. The incidents that led to the November 5 written warning include:

October 10, 2010, the claimant was scheduled to work at 4 p.m. but he did not report until 5 p.m. The employer had no record that the claimant called his supervisor to report he would be late.

October 11, the claimant was scheduled to work 11 p.m. At 11:37 p.m. the claimant called to report he overslept and would be late. The claimant was at work by midnight.

October 18, the claimant was scheduled to work at 9 p.m. The claimant called his supervisor around 7:30 p.m. to ask if he could report to work at 11 p.m. The claimant was told

to call the staff he would be replacing to see if they could stay an extra two hours. The employer had no record the claimant called the staff already working.

On November 4, 2010, the claimant was scheduled to work 5 to 9 p.m. He clocked in at 5:30 p.m. and left at 8 p.m. Although the schedule indicated the claimant was to work 5 to 9 p.m., his supervisor told the claimant he could report to work at 5:30 p.m. and leave when the other staff person returned to the house, which was 8 p.m.

The November 5 written warning informed the claimant that if he did not work as scheduled and did not receive prior approval for any schedule deviation, he would be suspended and could be terminated.

The claimant received another written warning on November 18, 2010. As a result of deviations in his scheduled work on November 11 and 14, the employer informed the claimant that if he was going to be late he had to contact his supervisor. Also, he failed to follow the employer's procedures and had two more instances of tardies in the next 30 days, he would be terminated.

The claimant had problems interacting with a client at the location he was working. The employer changed the location where the claimant worked. In addition to changing his job site location, the employer did not have Sunday afternoon shifts available for the claimant to work as he had been. Instead, the employer had Sunday morning shifts available. Even though the claimant protested working Sunday mornings, which prevented him from attending church services, the claimant started working Sunday mornings because the employer did not have any other weekend shift available for him at the new location.

On January 8, 2011, the claimant reported he worked until 6:30 p.m., but actually left work at 6:15 p.m. The employer gave him the day off from work for misreporting his time.

In addition to working, the claimant attends school. Sometime before January 17, the claimant received a letter from the school informing he had to follow certain steps or he would have to immediately pay back his student loans. On January 17, 2011, the school's financial aid representative contacted the claimant and told him he had a 3 p.m. appointment regarding his student loan. The claimant understood he could not change the time of the appointment and he did not want problems with his student loan. The claimant immediately called Hagen around 1 p.m. to let her know he would probably be late. The claimant had to leave a message on Hagen's voice mail. His shift started at 3:30 p.m. Hagen did not listen to the claimant's message until 2 or 2:30 p.m. and did not know when the claimant would be at work. She did not try to contact the claimant to find out when he would be at work. The claimant reported to work at 4 p.m. The employer expected the claimant to contact O'Hara when he was unable to personally talk to Hagen. The claimant, however, had not previously contacted O'Hara when he was just late for work.

On January 20, 2011, the employer discharged the claimant for excessive absences and tardies and for failing to properly notify his supervisor or management that he would be late. The employer did not consider the claimant's excuse for reporting to work late on January 17 valid and did not excuse his January 17 tardy.

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).

The evidence establishes that after the claimant received the November 5 and 19 written warnings, he did not have any attendance issues until January 17, 2011. On January 17, the claimant may have used poor judgment when he failed to let the employer know how late he would be, but Hagen could have called him when she listened to his message and did not. The claimant took reasonable steps when a financial aid representative gave him the impression he had to attend the 3 p.m. meeting on January 17 or the school would start making him pay back his student loans. Based on the facts presented during the hearing, the employer discharged the claimant for business reasons, but did not establish that the claimant committed work-connected misconduct. As of January 23, 2011, the claimant is qualified to receive benefits.

DECISION:

The representative's February 21, 2011 determination (reference 01) is reversed. The employer discharged the claimant, but the claimant did not commit a current act of work-connected misconduct. As of January 23, 2011, the claimant is qualified to receive benefits, provided he meets all other eligibility requirements. The employer's account is subject to charge.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs