

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PERRY L KILBY
Claimant

APPEAL NO. 12A-UI-02244-A

**ADMINISTRATIVE LAW JUDGE
DECISION**

LANSINK CONSTRUCTION INC
Employer

OC: 01/08/12
Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Perry L. Kilby filed a timely appeal from an unemployment insurance decision dated February 22, 2012, reference 01, that disqualified him for benefits. After due notice was issued, a hearing was held in Des Moines, Iowa on April 4, 2012 with Mr. Kilby participating. Exhibit A was admitted into evidence on his behalf. President Correy Lansink participated for the employer, Lansink Construction, Inc. Employer Exhibit One was admitted into evidence.

ISSUE:

Was the claimant discharged for misconduct in connection with the employment?

FINDINGS OF FACT:

Perry L. Kilby had been employed by Lansink Construction, Inc. for several years at the time of his discharge on January 9, 2012. He was employed as a carpenter. The events leading to discharge occurred on Thursday, December 22, 2011. The claimant was working on a crew in Shenandoah, Iowa. He had requested permission from his foreman, Nate Lowry, to leave at the end of the day for the Christmas weekend. Mr. Lowry denied permission because another employee had already been given permission to leave a day early. Mr. Kilby left without permission, taking several co-workers with him. Without permission, Mr. Kilby bought dinner for himself and the co-workers with a company credit card at Johnny's Steakhouse. Often, the foreman of a crew working out of town would buy dinner for the crew on Thursday evenings both as a reward for their working out of town and as an incentive for them to show up on Friday rather than returning home. Although Mr. Kilby had a company credit card, he was not the foreman. He did not have permission to use the card for this purpose.

President Correy Lansink was out of town over the holidays. He learned of the incidents on January 6, 2012. Mr. Lowry did not have permission to discharge employees. He had allowed Mr. Kilby to work during the week between Christmas and New Year's Day. January 6 was the first opportunity for Mr. Lansink and Mr. Lowry to discuss what had happened. Mr. Lansink confronted Mr. Kilby on January 7. He told Mr. Kilby that he was suspended pending further consideration. He discharged Mr. Kilby in a brief telephone call on January 9, 2012.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence establishes that the claimant was discharged for disqualifying misconduct. It does.

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.

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 of proof. See Iowa Code § 96.6-2. Neither party produced witnesses that could have corroborated or contradicted their testimony. Mr. Kilby made statements attributed to co-workers. Mr. Lansink had no real way to dispute the statements. Similarly, Mr. Lansink gave testimony attributed to information he had received from Mr. Lowry. Mr. Kilby did not have the opportunity to cross-examine Mr. Lowry.

The administrative law judge must determine credibility based on the plausibility of the stories and their consistency. Mr. Kilby offered no corroboration and backed off his first statement that he and Mr. Lansink has discussed the credit card matter on December 30. Mr. Kilby's accounting of his conversation with Mr. Lowry on December 22 was imprecise. Given the testimony of Mr. Lansink and the document prepared and signed by Mr. Lowry, the administrative law judge finds the employer's testimony the more credible. Thus, the findings of fact basically reflect the employer's version of the evidence. This evidence persuades the administrative law judge that Mr. Kilby left the job site without permission on December 22. His own testimony established that he did not have permission to use the credit card that day.

The remaining question is whether the evidence establishes that Mr. Kilby was discharged because of a current act of misconduct as required by 871 IAC 24.32(8). Mr. Lansink testified under oath and subject to cross-examination that he did not learn of the incidents of December 22 until January 6. Mr. Kilby did not effectively dispute that testimony. The administrative law judge concludes that the final incident leading to discharge was a current act of misconduct in that the person with authority to discharge learned of the incident only on January 6 and completed the discharge on January 9.

DECISION:

The unemployment insurance decision dated February 22, 2012, reference 01, is affirmed. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Dan Anderson
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs