

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEREMY J FORTMANN
Claimant

APPEAL NO. 11A-UI-05801-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ART PAPE TRANSFER INC
Employer

OC: 04/03/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated April 21, 2011, reference 01, which denied unemployment insurance benefits. After due notice a telephone hearing was held on May 24, 2011. Claimant participated personally. The employer participated by Mr. Loras Pape, CEO. Kyle Tigges was an observer.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Jeremy Fortmann was employed by Art Pape Transfer, Inc. from April 4, 2010 until March 22, 2011 when he was discharged at the end of the work shift. Mr. Fortmann was employed as a full-time maintenance helper and was paid by the hour. His immediate supervisor was Pat Schmitt.

Mr. Fortmann was discharged on March 22, 2011 because the employer felt his attendance record was not satisfactory. The claimant had most recently been absent one week before on March 14, 2011 when he had been incarcerated for one day. Mr. Fortmann had been absent or tardy in reporting for work approximately on 11 occasions since January 2011. The claimant had not received any written or official warnings from the company prior to his discharge..

Mr. Fortmann had informed his immediate supervisor in advance of impending absences or tardiness. A number of the claimant's absences were due to court appearances and scheduled appointments with legal representation. The company's CEO, Loras Pape, had, on one or two occasions commented to the claimant about the claimant's attendance. Mr. Fortmann was not put on official notice that his employment was in jeopardy.

On Saturday, March 19, 2011, Mr. Pape met with the claimant after Mr. Pape had returned from being out of town for a one-week period. The claimant was instructed to remove personal

belongings from his father's truck. The claimant's father had quit the company at that time. Mr. Fortmann emphasized his desire to remain with the company although his father had quit. Mr. Pape did not state any dissatisfaction with the claimant's most recent absence that had occurred one week before or indicate that the claimant was to be terminated. After completing his duties on March 22, 2011, Mr. Fortmann was informed that he was being terminated for his absence on March 14, 2011.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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 in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination from employment and what misconduct warrants a denial of unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant the discharge of an employee may not necessarily be

serious enough to warrant the denial of unemployment insurance benefits. Such misconduct must be "substantial." The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992). While past acts can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

The evidence in the record establishes that although the company was aware of Mr. Fortmann's most recent absence on March 14, 2011, the claimant was allowed to remain employed and performing duties for the company until the end of his work shift over one week later on March 22, 2011. The evidence also shows that the claimant was not specifically warned or counseled regarding his attendance or punctuality. The claimant testified that he had informed his immediate supervisor of impending absences and that his supervisor had not indicated any issue to the claimant about his attendance or tardiness. The company's CEO also did not specifically warn Mr. Fortmann that his attendance was unsatisfactory and that he was close to discharge if his attendance did not improve, but instead made generalized statements to the claimant that did not sufficiently warn Mr. Fortmann that his employment was in jeopardy. The administrative law judge also notes that the claimant's discharge from employment took place within a few days after his father had left the company. The record reflects that Mr. Fortmann was initially hired at the request of the claimant's father and that the company had been generally dissatisfied with Mr. Fortmann's performance since being hired. The administrative law judge concludes that company's CEO made a management decision to separate the claimant after the claimant's father left the company and because of general dissatisfaction with the claimant's performance.

While the decision to terminate the claimant may have been a sound decision from a management viewpoint, the evidence does not establish that the claimant was sufficiently warned prior to being discharged or that the claimant was being discharged for a current act of misconduct on March 22, 2011. Benefits are, therefore, allowed, providing the claimant meets all other eligibility requirements of the law.

DECISION:

The representative's decision dated April 21, 2011, reference 01, is reversed. Claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs