

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

KENNETH E WOOD
Claimant

APPEAL NO. 18A-UI-08620-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALLIED SERVICES INC
Employer

OC: 07/15/18
Claimant: Appellant (2R)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Kenneth Wood (claimant) appealed a representative's August 9, 2018, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he voluntarily quit work with Allied Services (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 5, 2018. The claimant participated personally. The employer participated by Shannon Webber, Operations Assistant.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The employer is a temporary agency. The claimant was assigned to perform services for Kraft/Oscar Mayer on September 7, 2017, as a full-time operator. He signed for receipt of the employer's on-line handbook before his assignment began on November 20, 2017. The employer did not issue the claimant a paper copy of the handbook and it was unsure whether the claimant could access the handbook at the client location. The claimant did not receive any warnings during his employment.

The claimant last performed services on March 24, 2018. He properly reported his absences due to illness to the employer and the client from March 25 to April 3, 2018. On April 3, 2018, the client told the employer to discharge the claimant for absenteeism. On April 3, 2018, the employer discharged the claimant for absenteeism. The claimant told the employer he had walking pneumonia and back spasms.

From April 6 to April 8, 2018, the claimant was in a hospital in Davenport, Iowa. He was placed on antibiotics for two to three weeks but his health declined. On May 7, 2018, the claimant was flown to Iowa City, Iowa, and placed in the hospital. He had lost 120 pounds and was diagnosed with a work-related mold infection in his lungs. The claimant was released to a

rehabilitation facility from June 25 to July 7, 2018, where he re-learned to walk. After his release, he flew home to Norfolk, Virginia. His physician has not released him to return to work.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can

never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The only incident of absence was a properly reported illness which occurred from March 25 to April 3, 2018. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

The claimant's and the employer's testimony is inconsistent. The administrative law judge finds the claimant's testimony to be more credible because he was an eye witness to the events for which he was terminated. The employer was not an eye witness. When asked if it had any other witnesses for the hearing, the employer replied that it did not.

The issue of whether the claimant is able and available for work is remanded for determination.

DECISION:

The representative's August 9, 2018, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

The issue of whether the claimant is able and available for work is remanded for determination.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs