

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSEPH A SMITH
Claimant

ADDOCO INC
Employer

APPEAL NO: 11A-UI-02816-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/16/11
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant appealed a department decision dated February 28, 2011, reference 01, that held he was discharged for excessive unexcused absenteeism on December 9, 2010, and benefits are denied. A telephone hearing was held on March 30, 2011. The claimant, and Attorney Richardson, participated. Marilyn Phill, Office Manager, participated for the employer. Employer Exhibit 1 and Claimant Exhibit A was received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment as a full-time machine operator on March 4, 2010, and last worked for the employer a half-day on December 9. The claimant suffered injuries on December 3, and December 9 that employer denies are job related. Claimant reported back pain as a reason for missing work on December 6, 7 & 8 with a further message of a similar nature on December 13. Claimant talked with Office Manager Phill about his employment status on December 15, and he told her he had a doctor's appointment on December 20.

Claimant came into work and provided the employer during a meeting with the company president on December 23 with doctor releases dated December 8 & 20. The claimant was seen by a doctor on December 8 who released him to work on December 9. The same doctor saw claimant on December 20, and imposed work restrictions for no bending, squatting, twisting or lifting more than 10 pounds. The additional doctor remarks are probable workplace related injury with a request the employer should medically evaluate and treat as appropriate. The claimant advised that he expected to start physical therapy on January 20. Claimant believed he was told that the employer would proceed with the worker's compensation matter, and he was given no further instruction.

Claimant retained legal counsel who sent president Rodham a letter dated January 7, 2011 that he was representing claimant with a request it submit this matter to its worker's compensation carrier. On January 10, legal counsel prepared a Notice of Injury to the employer. On January 11, American Trust (employer benefit provider) sent claimant a letter that the employer informed it he was no longer employed. The employer did not offer written evidence it advised claimant he was terminated. Employer contends it terminated claimant for excessive absenteeism on January 7.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The administrative law judge concludes the employer has failed to establish claimant was discharged for misconduct in connection with employment on January 7, 2011, for excessive unexcused absenteeism.

The evidence is the employer terminated claimant when his legal counsel informed it by letter dated January 7, 2011 that he intended to pursue a worker's compensation claim. There is no evidence the employer responded to the letter or did it acknowledge the claim. Legal counsel confirmed the pursuit of the claim with the notice dated January 10 sent to the employer.

The company president knew on December 23 that claimant had been seen by a doctor for back injuries who opined were work related. The employer knew why claimant was absent from work and that he would continue to miss work for the same reason. If the employer had an issue with claimant's employment status, then it needed to communicate that on December 23 when it had the opportunity to do so or by written communication on or after that date. The lapse of time from when claimant met with the employer on December 23 to January 7 supports the conclusion that absenteeism was not the issue.

The employer stone-walled claimant and his legal counsel by disregarding the worker's compensation claim, and it terminated claimant when it learned he intended to pursue it. The employer never notified claimant he was terminated, but delegated the duty to its employee benefit provider on January 11.

DECISION:

The department decision dated February 28, 2011 reference 01, is reversed. The claimant was not discharged for misconduct on January 7, 2011. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs