

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BURTON C BAILEY
Claimant

APPEAL NO. 09A-UI-17849-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EMCO ENTERPRISES INC
Employer

OC: 10/25/09
Claimant: Respondent (1)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Emco Enterprises, Inc. (Emco) filed an appeal from a representative's decision dated November 18, 2009, reference 01, which held that no disqualification would be imposed regarding Burton Bailey's separation from employment. After due notice was issued, a hearing was held by telephone on January 20, 2010. Mr. Bailey participated personally. The employer participated by Mary Halverson, Senior Human Resources Generalist, and was represented by Michelle Hawkins of TALX Corporation. Exhibits One and Two were admitted on the employer's behalf.

ISSUE:

At issue in this matter is whether Mr. Bailey was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Bailey was employed by Emco from July 11, 2008 until October 29, 2009 as a full-time forklift operator. He was discharged because of his attendance. The final events that prompted his discharge were the failure to work mandatory overtime on October 15 and 16, 2009. He missed one of the days because he was meeting with his probation officer.

Mr. Bailey was not notified of his discharge until October 29. The employer has 14 days in which to take disciplinary action against an employee. He was not given any interim notice that he was being considered for discharge. Attendance was the sole reason for Mr. Bailey's discharge.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321

N.W.2d 6 (Iowa 1982). An individual who was discharged because of attendance is disqualified from benefits if he was excessively absent on an unexcused basis. In order for an absence to be excused, it must be for reasonable cause and must be properly reported. 871 IAC 24.32(7). The administrative law judge is not bound by an employer's designation of an absence as unexcused. There must be a current incident of unexcused absenteeism to support a disqualification from job insurance benefits. See 871 IAC 24.32(8).

In the case at hand, Mr. Bailey was discharged on October 29 for conduct that occurred on October 15 and 16. The reason for the delay is that the employer is allowed 14 days in which to take disciplinary action. The grounds for discharge listed under a contract of hire are irrelevant to a determination of eligibility for job insurance benefits. Hurtado v. Iowa Department of Job Service, 393 N.W.2d 309 (Iowa 1986). If the grounds for discharge are irrelevant, then it would seem that the timeframes for taking action would likewise be irrelevant. Mr. Bailey's supervisor would certainly have been aware of his precarious situation regarding his attendance. The supervisor would also have been aware that he failed to work mandatory overtime on two consecutive dates. For the above reasons, the employer's two-week delay in discharging Mr. Bailey precludes considering the absences of October 15 and 16 as current acts in relation to the October 29 discharge date.

Inasmuch as the employer has failed to establish a current act of misconduct, no disqualification is imposed. It was certainly the employer's prerogative to discharge Mr. Bailey. However, the facts do not support a basis for disqualifying him from the receipt of job insurance benefits.

DECISION:

The representative's decision dated November 18, 2009, reference 01, is hereby affirmed. Mr. Bailey was discharged by Emco but disqualifying misconduct has not been established. Benefits are allowed, provided he is otherwise eligible.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/css