

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEVEN C KEY
Claimant

APPEAL NO. 07A-UI-05058-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GRAY TRANSPORTATION INC
Employer

**OC: 04/29/07 R: 03
Claimant: Respondent (1)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated May 16, 2007, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on June 4, 2007. The parties were properly notified about the hearing. The claimant participated in the hearing. Darrin Gray participated in the hearing on behalf of the employer.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked for the employer as a shag driver for the employer at the Tyson Fresh Meats plant. His work shift was from 6:00 p.m. to 6:00 a.m. His immediate supervisor was Paul Beninga.

Around February 2007, the claimant had missed several days of work due to his father's illness and death. When he returned to work, he received a warning from the owner of the business, Darrin Gray, because Gray suspected the claimant was not being truthful about the reasons for his absence and the claimant did not provide proof regarding the absences.

On April 11, 2007, the claimant was sleeping in his truck because he had fallen asleep while he was taking his break. He did not respond to the dispatcher and a truck driver found him asleep in the truck. Later, this was reported to Beninga, and Beninga suspended the claimant from work on April 16 and 17.

On April 18, 2007, the claimant called Beninga in the afternoon and asked him if he could take that day off. A friend had died earlier in the week, and the claimant wanted to go to a gathering of the deceased person's friends at his son-in-law's house. Beninga told the claimant that he could afford to only have one day's pay for the week he could go.

Beninga contacted Gray and told him about the claimant taking the day off and why. Gray objected to the claimant taking the time off based on his recent warning and suspension. Gray tried reaching the claimant on his cell phone, but he did not answer. Gray left a message that if he did not report to work that evening, he was fired.

The claimant did not receive the message until the next day. When he got the message, he called Gray, and Gray restated that he was terminated. The employer terminated the claimant for taking the day off to attend a social event after having previously been warned and suspended.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Iowa Code section 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(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.

While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established. No willful and substantial misconduct has been proven in this case. The claimant requested the time off and the time off was granted by the claimant's supervisor. Under the circumstances, the claimant's request seems presumptuous based on the fact that he was coming off a suspension, but his supervisor could have denied the request. Sleeping on the job could have been an act of disqualifying misconduct, but the claimant had already received discipline for that offense, so it cannot be considered a current act, since the employer choose not to discharge the claimant for that conduct.

DECISION:

The unemployment insurance decision dated May 16, 2007, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/kjw