

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

BEN J KELLER
Claimant

APPEAL NO. 18A-UI-07416-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SEEDORFF MASONRY INC
Employer

OC: 10/01/17
Claimant: Appellant (2R)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Ben Keller (claimant) appealed a representative's July 9, 2018, decision (reference 04) that concluded he was not eligible to receive unemployment insurance benefits because he voluntarily quit work with Seedorff Masonry (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 27, 2018. The claimant participated personally. The employer participated by Allan Hermesen, Payroll Supervisor, and Jim Burger, Area Superintendent.

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 claimant was hired on May 1, 2006, as a full-time laborer/operator. The employer had an employee handbook. The handbook may have stated that two absences without report to the employer is a voluntary quit or a termination. The claimant had some attendance issues but the employer did not issue him any written warnings.

On May 24, 2018, the claimant notified his foreman that he wanted to take paid time off (PTO) on June 7 and 8, 2018. The foremen entered information into a computer and told the claimant the days were recorded. The claimant thought he had enough PTO available for June 7 and 8, 2018, based on the information the employer provided on his paystubs. It was not the employer's custom to notify employees when PTO was granted. Employees were allowed to take unpaid time off if they did not have enough PTO.

The claimant had been absent due to medical issues and had been tardy a few times. For the week ending October 7, 2017, the claimant was sick with influenza and went to the emergency room. He could not work that entire week due to illness. The claimant received unemployment

insurance benefits in the amount of \$441.00 for the week ending October 7, 2018. The employer reported that the claimant was laid off for lack of work.

On June 1, 2018, the area superintendent talked to the claimant about his attendance. He told the claimant that he needed to try to come to work every day or report his absences to the area superintendent. The area superintendent did not warn the claimant with further disciplinary action or termination.

On June 6, 2018, the claimant finished working at the Marshalltown, Iowa, work site. His foreman asked him to drive to the Des Moines, Iowa, work site. The claimant told the foreman his expensive personal truck did not sound good and he was worried about driving it so far. He started the truck to let the foreman hear it. The foreman agreed with the claimant and thought they should call the area superintendent. The claimant told the area superintendent that he could change the sparkplugs and call them back. The area superintendent told the claimant to do what he thought was best. After the call ended, the foreman and claimant agreed the claimant would contact the foreman after the claimant fixed the truck. The claimant left the worksite at about 10:00 a.m. on June 6, 2018, to buy sparkplugs.

At about 1:50 p.m. on June 6, 2018, the claimant contacted the foreman after changing the sparkplugs. The area superintendent did not answer his telephone. The foreman told the claimant it was too late to go to Des Moines, Iowa, and the claimant did not work the rest of the day.

On June 7 and 8, 2018, the claimant took his family to the Dells. On Sunday, June 10, 2018, the claimant called and sent texts to the area superintendent asking where he should appear for work on Monday, June 11, 2018. The area superintendent told him there was no work for him. The employer terminated the claimant because it had no record the claimant requested PTO on June 7, 2018. It had a record of his request for PTO on June 8, 2018. It considered the claimant to have failed to report his absence on June 7, 2018. It also terminated the claimant for failure to go to the jobsite in Des Moines, Iowa, on June 6, 2018.

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).

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 employer terminated the claimant for improper reporting of an absence on June 7, 2018, and failure to drive to Des Moines, Iowa on June 6, 2018.

On June 6, 2018, the employer expected the claimant to drive his personal vehicle approximately one hour to a different worksite. His vehicle was not road ready. The claimant requested permission from both his area supervisor and his foreman to repair the vehicle and permission was granted. The employer did not offer the claimant any other transportation to the other worksite. The claimant properly reported his activity during the day. When the repairs were completed, the claimant notified the employer and no other work was assigned. The employer did not provide any issues of misconduct associated with the incident.

The claimant requested time off on June 7 and 8, 2018. The employer did not have a process for granting or denying an employee's permission. It just recorded the absences. Once the employee requested the time, he either took the time as PTO or unpaid time off. The employer never told the claimant he could not go. The claimant followed the employer's policy. The foreman did not enter both days into the computer. The claimant was terminated for the foreman's mistake. The claimant properly reported his absence on June 7, 2018

The employer did not provide evidence of job-related misconduct on June 6 or 7, 2018. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

The issue of whether the claimant was able and available for work for the week ending October 7, 2017, is remanded for determination.

DECISION:

The representative's July 9, 2018, decision (reference 04) 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 was able and available for work for the week ending October 7, 2017, is remanded for determination.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs