IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOSHUA E SIMMONS
Claimant

FRES-CO SYSTEM USA INC
Employer

APPEAL NO: 07A-UI-03459-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/04/07 R: 01
Claimant: Appellant (2)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Joshua E. Simmons (claimant) appealed a representative's March 30, 2007 decision (reference 02) that concluded he was not qualified to receive unemployment insurance benefits, and the account of Fres-Co System USA, Inc. (employer) would not be charged because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 19, 2007. The claimant participated in the hearing. Cynthia Farmer, Don Romig and Mike Prahst appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on July 24, 2006. The claimant worked as a full-time press operator. Employees receive 24 hours of scheduled personal time off during a year. If an employee is unable to work as scheduled, the employer requires an employee to contact the employer two hours before a scheduled shift. The claimant received a copy of the employer's attendance policy on July 27 and October 31, 2006.

On February 2, 2007, on his way to work, the claimant fell asleep while driving. The claimant ended up driving his vehicle into a ditch. As a result of the accident, he damaged his vehicle and hurt his shoulder. Although the claimant contacted a friend who had a tow truck and his insurance company, the claimant did not think about contacting the employer until around noon. On February 5, the claimant notified the employer that he was unable to work and was going to the doctor. The claimant called the employer on February 6 indicating his doctor restricted him from working until February 9. The claimant did not report to work on February 9. On February 12, the claimant notified the employer that he was still unable to work. On February 13 the claimant had a doctor's appointment and properly notified the employer that he was unable to work. On February 14, the claimant provided the employer with a doctor's

statement verifying the claimant had not been released to work until February 14 and he was restricted from lifting more than 40 pounds.

Since the claimant had previous attendance issues, the employer gave the claimant a written warning on February 15 for continued attendance problems. The employer considered the claimant's February 2 absence as a no-call, no show situation because the claimant failed to properly notify the employer he was unable to work. The employer warned the claimant that if he had another no-call, no-show incident, he would be discharged. The warning informed the claimant that his attendance was not acceptable so he would be placed on probation to improve his attendance. The employer warned the claimant that failure to work as scheduled could result in his termination.

On February 28, the claimant became ill at work. Before the claimant left work, the employer warned him that continuing attendance problems put his job in jeopardy. Since the claimant had been vomiting at work, he left work early. On March 1, the claimant still did not feel well but called to ask if he should report for work. The employer told the claimant it was his decision as to whether he came to work or not. The claimant reported for work as scheduled.

On March 1, there was a snowstorm. The claimant had to leave his car at work because of the snowstorm. The claimant caught a ride with co-workers to their home. He then contacted a friend who had a tow truck who came and picked him up and took him home. The next morning, March 2, the claimant called a co-worker for a ride to work, but this employee had taken the day off. The claimant did not know the phone number of anyone else in an attempt to find a ride to work. The claimant called his supervisor's office phone number and left a message that he was unable to get to work. The claimant did not know his supervisor had taken a vacation day and was not at work. The employer did not know the claimant had called until 2:00 p.m. when someone listened to the phone messages on the supervisor's phone. Because the claimant did not call the employer two hours before his scheduled shift and did not make sure the employer knew he would not be at work, the employer considered the March 2 absence as the claimant's second no-call, no-show incident. On March 5, 2007, the employer discharged the claimant for continuing attendance problems.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence

or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

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. 871 IAC 24.32(8).

The law presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7).

The claimant understood his job was in jeopardy if he did not notify the employer when he was unable to work as scheduled. The claimant also knew that if he continued to be absent from work, the employer would discharge him. The claimant demonstrated he knew his job was in jeopardy when he reported to work on March 1 even though he did not feel well.

On March 2, the facts indicate the claimant attempted to find a ride to work because his vehicle was stranded or stuck at the employer's parking lot overnight. The claimant was unsuccessful in finding a way to work. The claimant then notified the employer that he was unable to work as scheduled. The claimant took reasonable steps in contacting the employer to report he was unable to get to work.

The employer established business reasons for discharging the claimant. Based on his attendance record, the claimant was not a dependable or reliable employee. While the employer was justified in placing the claimant on probation on February 15 for attendance problems, the claimant's failure to work February 2 through 14 was verified by his doctor that he was unable to work these days. The facts also establish the claimant was ill when he went home early on February 28, 2007. The claimant took reasonable steps to notify the employer he was unable to work as scheduled on March 2. The claimant had no way of knowing his supervisor was not at work on March 2. The claimant also took reasonable steps in trying to get to work that day. The facts do not establish that the claimant intentionally failed to work as scheduled on March 2. The claimant did not commit a current act of work-connected misconduct. Therefore, as of March 4, 2007, the claimant is qualified to receive unemployment insurance benefits.

DECISION:

The representative's March 30, 2007 decision (reference 02) is reversed. The employer discharged the claimant for business reasons that do not constitute work-connected

misconduct. As of March 4, 2007, the claimant is qualified to receive unemployment insurance benefits, provided he meets al other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

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Debra L. Wise
Administrative Law Judge

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Decision Dated and Mailed

dlw/pjs