

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DUANE E OLIVER
Claimant

APPEAL NO. 11A-UI-02010-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

TRINITY STRUCTURAL TOWERS INC
Employer

**OC: 12/19/10
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated February 14, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 17, 2011. Claimant participated. Employer participated by Debra Emmert, human resources generalist. The record consists of the testimony of Debra Emmert; the testimony of Duane Oliver; Claimant's Exhibit A-D; and Employer's Exhibits 1-4.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer builds wind towers at its manufacturing facility located in Newton, Iowa. The claimant was hired on June 14, 2010, as a welder. His last day of work was October 23, 2010. He was terminated on November 16, 2010, for excessive absenteeism.

On October 25, 2010, the claimant woke up with severe back pain. He called his employer to report his absence. The employer requires all workers to report any absence at least one hour prior to the start of the shift. The claimant complied with this policy. The claimant was absent from work from October 25, 2010, through November 13, 2010. He called every day with the exception of November 12, 2010, and November 13, 2010. The claimant was taking pain medication that affected his ability to stay awake.

The claimant was going to be released to return to work on November 22, 2010. The employer informed the claimant on November 14, 2010, that his services were no longer needed. The claimant filed his original claim for benefits with an effective date of December 19, 2010. At that time he was full released by his physician. The claimant has been actively seeking work in

manufacturing or welding. He is physically capable of doing the work he has done in his past working life.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant was discharged for misconduct.

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(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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). Absence due to illness and other excusable reasons is deemed

excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7). The employer has the burden of proof to show misconduct.

The evidence in this case established that the absenteeism that led to the claimant's termination was due to personal illness. The claimant had somehow injured his back and was in severe pain as a result. He was treated by both a physician and a chiropractor and required three different types of medication. The claimant kept the employer informed on his status, with the exception of November 12, 2010, and November 13, 2010. The claimant admitted that he might not have called on those days because of the effects of his pain medication.

Iowa law states that if an individual is absent due to personal illness and properly reports those absences to his employer, the absence is deemed excused for purposes of unemployment insurance compensation. The evidence in this case shows that the absences on which the claimant's termination was based were excused under the law. The employer cannot show excessive unexcused absenteeism. Benefits are allowed.

The next issue is whether the claimant is able and available for work.

871 IAC 24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

The evidence established that the claimant was released to return to work with no restrictions at the time he established his claim for benefits on December 19, 2010. He has no physical restrictions and is actively looking for work in manufacturing and welding. The claimant is able and available for work as of December 19, 2010.

DECISION:

The decision of the representative dated February 14, 2011, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs