

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BLAKE COOPER
Claimant

APPEAL NO. 07A-UI-03764-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERICAN HOME SHIELD CORP
Employer

**OC: 03/11/07 R: 01
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

American Home Shield Corporation (employer) appealed an unemployment insurance decision dated April 6, 2007, reference 01, which held that Blake Cooper (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 26, 2007. The claimant participated in the hearing with his wife, Jeri Cooper. The employer participated through Jackie Evans, Customer Relations Supervisor; Amy Platt, Human Resources Manager; Connie Janning, Human Resources Coordinator; and employer representative Elizabeth Svehlek. Employer's Exhibits One through Three were admitted into evidence. 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:

The issue is whether the employer discharged the claimant for work-related misconduct.

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 as a full-time customer relations representative on April 10, 2006. His last day of work was February 9, 2007 and he was discharged on March 7, 2007 due to attendance. The claimant had previously received two written warnings for attendance but the employer started a new attendance point policy in 2007. In addition to using 48 hours of paid sick leave, the claimant acquired 26 attendance points. No warnings were issued because he had not returned to work after February 9, 2007. All of his absences were reported and excused except for March 5 and 6, 2007. He either took vacation, was absent due to illness or was absent due to his son's illness.

The claimant had taken vacation during the week beginning February 26, 2007 but only had three days left so the employer called him on February 28, 2007 to let him know he needed to return to work on March 1, 2007. The claimant left a voicemail message for the employer on March 1, 2007 and stated that he could not return to work that day or the next due to his son's illness. His son was having tests taken at the hospital in Des Moines, Iowa. The employer left

the claimant a message that medical documentation was needed by noon on March 5, 2007. No medical documentation was provided and the claimant was a no-call/no-show on March 5 and 6, 2007. Another message was left for the claimant on March 6, 2007 advising him he had until 5:00 p.m. to provide the medical documentation or he would not have a job. The claimant was out of town until Tuesday so did not receive the employer's messages. He and his wife had been at the hospital in Des Moines with their son. The employer considered the claimant to have voluntarily quit and the claimant considered that he was terminated effective March 7, 2007.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the reasons for the claimant's separation from employment qualify him to receive unemployment insurance benefits. The claimant is not qualified to receive unemployment insurance benefits if he voluntarily quit without good cause attributable to the employer or if the employer discharged him for work-connected misconduct. Iowa Code sections 96.5-1 and 96.5-2-a.

Rule 871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The claimant was consistent in expressing his wish to return to work with the employer. In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980) and Peck v. Employment Appeal Bd., 492 N.W.2d 438 (Iowa Ct. App. 1992). The claimant did not exhibit the intent to quit and did not act to carry it out. Since the claimant did not have the requisite intent necessary to sever the employment relationship so as to treat the separation as a "voluntary quit" for unemployment insurance purposes, it must be treated as a discharge.

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.

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 substantial and 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).

The claimant was discharged for excessive absenteeism. Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant's excessive absences were due to illness and were properly reported except for two days. Although the claimant contends he previously reported his absences for March 5 and 6, the evidence is more persuasive that he did not. However, his son was sick and in the hospital taking tests and the employer was aware of the claimant's son's health condition. Based on these circumstances, the claimant's failure to contact the employer for two days does not amount to disqualifying misconduct. Benefits are allowed.

DECISION:

The unemployment insurance decision dated April 6, 2007, reference 01, is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css