

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JASON D SCHREIER
Claimant

APPEAL NO. 12A-UI-02419-VST

MANN CONSTRUCTION
Employer

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/08/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated March 5, 2012, reference 01, which held that the claimant was eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 28, 2012. The claimant participated. Although the employer responded to the hearing notice, when the number was dialed by the administrative law judge, voice mail picked up. A detailed message was left for the employer on how to participate in the hearing. The employer did not call in during the hearing. The record consists of the testimony of Jason Schreier.

ISSUE:

Was the claimant discharged for misconduct that disqualifies him from receiving unemployment insurance benefits?

FINDINGS OF FACT:

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

The claimant was hired as a general laborer in August 2011. He was a full-time employee. The claimant's last day of work was in January 2012. He was terminated In January 2012. The claimant does not know the exact date of termination or the last day he worked for the employer.

The incident that led to the claimant's termination occurred the day before his termination. The claimant asked Justin, his supervisor, for permission to leave early because he had to take his infant son to the doctor. His son was sick. Justin gave him permission. The next day the claimant was terminated by Mr. Mann.

REASONING AND CONCLUSIONS OF 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.

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 as transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

The evidence in this case established that the claimant's final absence was an excused absence. The claimant received permission from his supervisor, Justin, to leave early in order to take his son to the doctor. If the employer excuses a final absence and then terminates the claimant, the claimant is not discharged for a current act of misconduct. Benefits are therefore allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated March 5, 2012, reference 01, is affirmed. Unemployment insurance benefits shall be allowed, if the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs