

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ARTHUR D FOY
Claimant

APPEAL NO: 11A-UI-12522-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ASSOCIATED MATERIALS LLC
Employer

OC: 08/28/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Arthur D. Foy (claimant) appealed a representative's September 19, 2011 decision (OC 08/28/11 – reference 02) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Associated Materials, L.L.C. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 17, 2011. This appeal was consolidated for hearing with one related appeal, 11A-UI-12521-DT, regarding a prior benefit year. The claimant participated in the hearing and presented testimony from one other witness, Aaron Ballard. Anna Garcia appeared on the employer's behalf. Based on the evidence, the arguments of the parties, a review of the law, and assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

After a prior period of employment with the employer through a temporary employment firm, the claimant started working directly for the employer on February 28, 2011. He worked full time as a wrapper in the employer's Cedar Rapids, Iowa Window manufacturing business. His last day of work was June 2, 2011. The employer discharged him on June 6. The reason asserted for the discharge was excessive absenteeism.

The employer's attendance policy provides for discharge upon an employee reaching six points. Prior to June 3 the claimant had reached 3.5 points, due to a tardy on March 1 (.5 point), an absence on March 3 (1 point), an absence on April 13 (1 point), a tardy on April 29 (.5 point) and a tardy on May 20 (.5 point). He was given a verbal warning on April 14.

On June 3 the claimant called in an absence because he was distraught as his wife had just left with the couple's children. He was assessed one point for this absence. On June 3 the employer discharged the claimant due to his attendance. Even though the claimant was only at

4.5 points under the six point policy, the employer concluded that the claimant was “racking up points” too quickly, so when the claimant sought to return to work on June 6, he was discharged.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant’s employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Excessive and unexcused absenteeism can constitute misconduct. 871 IAC 24.32(7). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer’s attendance policy. Cosper, supra; Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007). However, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant’s knowledge that the occurrence could result in the loss of his job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). Here the claimant did not believe that his absence on June 3 would result in his discharge, as it did not bring the claimant to the discharge level. Therefore, the absence cannot be considered intentional. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant’s actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's September 19, 2011 decision (OC 08/28/11 – reference 02) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs