

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES E SMITH

Claimant

APPEAL NO. 08A-UI-04253-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BE & K CONSTRUCTION COMPANY

Employer

**OC: 04/06/08 R: 04
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated April 30, 2008, reference 01, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on May 15, 2008. The parties were properly notified about the hearing. The claimant participated in the hearing. Maggie McNitt participated in the hearing on behalf of the employer.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked as a maintenance mechanic for the employer from October 27, 2004, to April 11, 2008. The claimant was informed and understood that under the employer's work rules, employees were required to notify the employer if they were not able to work as scheduled and were subject to discharge if they receiving 15 attendance points under the employer's attendance policy. Points were assessed for unscheduled absence, lateness, or leaving work early. An excused absence (properly reported absence with a doctor's note) was one point, an unexcused absence (properly reported absence without a doctor's note) was two points, lateness or leaving work early was one-half point, and an absence without notice was three points. Discipline is given at five points and ten points.

The claimant was given a written warning on December 4, 2007, for having over five points. Points were assessed for unexcused absences on August 20, August 23, September 25, and November 9 and for leaving work early on October 26, 2007.

The claimant was suspended on February 11, 2008, for having over ten points as of February 1. Points were assessed for excused absences from December 10 to 13, 2007, and January 29 to February 1, 2008, which were due to legitimate illness, which was properly reported and excused by a doctor's excuse. He had an unexcused absence on January 22 for an unknown reason.

On February 8, the claimant had an unexcused absence. It probably was due to running out of propane and the claimant had to run electric heaters and wait for the propane to be delivered to prevent his pipes from freezing. He left work early for unknown reasons on March 13 and had an excused absence on March 24. On April 2, the claimant worked a twelve-hour shift that ended at midnight. He was told that he could not come in any earlier than eight hours after the shift ended and was unaware that there was a specific start time the next morning. He arrived at work at 8:34 a.m., which the employer counted as four minutes late. At that point, the claimant had 14.5 points. He, however, was unaware that he had been given half a point for April 3, or that he had 14.5 points and would be discharged if he was absent, late, or left work early again.

The claimant reported to work as scheduled on April 8. He spoke to the payroll clerk about having the direct deposit of paycheck changed to have the employer pay him by check. This was because he and his ex-girlfriend had a joint bank account and the ex-girlfriend had left him and taken the checkbook with her. If the paycheck was deposited he would not have a way of accessing his funds or preventing his ex-girlfriend from taking his money. The payroll clerk told him that the employer could not issue him a paycheck. He then told the payroll clerk that if he could not get his paycheck, he would have to leave to make an arrangement at the bank to make sure he got his pay. The payroll clerk said "okay, that's fine." The claimant did not believe he was going to be assessed any points under the circumstances.

The employer assessed the claimant a half point for leaving work early on April 8, 2008, which put him at 15 points on the attendance. The claimant then was discharged for violating the attendance policy.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance 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.

871 IAC 24.32(7) provides:

Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

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).

While the employer may have been justified in discharging the claimant under its attendance policy, work-connected misconduct as defined by the unemployment insurance law has not been established. No current act of willful and substantial misconduct has been proven in this case. The claimant was unaware that his start time after working a 12-hour shift ending at midnight was 8:30 a.m. the next morning or that he was consider late for work that day. The claimant believed he had permission to leave work on April 8 and did not know he was the limit for attendance points. Many of his prior absences were due to legitimate illness, which was properly reported and excused by a doctor's excuse.

DECISION:

The unemployment insurance decision dated April 30, 2008, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css