IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRANDON S SUTTON
Claimant

ASPLUNDH TREE EXPERT CO
Employer

APPEAL NO. 11A-UI-14568-HT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/09/11
Claimant: Appellant (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Brandon Sutton, filed an appeal from a decision dated November 1, 2011, reference 01. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on December 9, 2011. The claimant participated on his own behalf and with witness, Rusty McQuin. Asplundh participated by General Foreman, Todd Babbel, and Supervisor, Adam Larson. Exhibit One was admitted into the record.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment insurance benefits.

FINDINGS OF FACT:

Brandon Sutton was employed by Asplundh from January 4, 2010 until October 6, 2011 as a full-time trimmer. He had received a written warning on July 19, 2011 for being late to work for three consecutive days, July 14, 15, and 18, 2011. He received a verbal warning from General Foreman Eric Nelson on August 14, 2011 for being no-call/no-show to work.

Mr. Sutton received further written warning on October 3, 2011 for being 20 minutes late to work. He refused to sign the warning. Another warning was issued on October 5, 2011 when he was 40 minutes late to work due to a flat tire. He refused to sign that warning as well but he was given the opportunity to read it and it notified him his job was in jeopardy.

The final incident was on October 6, 2011 when he was 10 minutes late for work without notifying the general foreman he would be late. He was late on that day because he “got a late start.” That was the reason for the other tardies of 10 and 15 and 20 minutes in the past. General Foreman Todd Babbel discharged him in person later in the day on October 6, 2011 after consulting with Supervisor Adam Larson.

The parties were advised prior to the start of the hearing that those using a cell phone contrary to the recommendation against their use would not be called back if they lost the connection during the hearing. Mr. Sutton lost the connection at 8:46 a.m. and by the time the record was closed at 8:52 a.m. he had not contacted the Appeals Section as instructed.

The record was closed at 8:52 a.m. and at 8:54 a.m. the claimant did call back in. He acknowledged his cell phone had lost the connection.

REASONING AND CONCLUSIONS OF LAW:

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(7) provides:

> (7) 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 claimant had been advised his job was in jeopardy as a result of his chronic tardiness. The reason he was tardy most of the time was because he "just got a late start." The only other tardy was due to a flat tire. Matters of purely personal consideration such as oversleeping or transportation problems are not considered an excused absence. *Harlan v. Iowa Department of*

Job Service, 350 N.W.2d 192 (Iowa 1984). The claimant was discharged for excessive, unexcused tardiness. Under the provisions of the above administrative code section this is misconduct for which he is disqualified.

871 IAC 26.14(7) provides:

> (7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.
>
> a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.
>
> b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.
>
> c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The claimant was advised prior to the start of the hearing that cell phones were not recommended and that if the cell phone lost the connection, he would not be called back until he contacted the Appeals Section to indicate his cell phone was working again or he had found another phone to use. He did, in fact, lose the connection and did not contact the Appeals Section prior to the close of the record. Failure to read and follow the instructions of the notice of the hearing does not constitute good cause to reopen the record. The request is denied.

DECISION:

The representative's decision of November 1, 2011, reference 01, is affirmed. Brandon Sutton is disqualified and benefits are withheld until he has requalified by earning ten times his weekly benefit amount, provided he is otherwise eligible.

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Bonny G. Hendricksmeyer
Administrative Law Judge

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Decision Dated and Mailed

bgh/pjs