

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TODD ENGA
Claimant

CRESCENT ELECTRIC SUPPLY COMPANY
Employer

APPEAL 21A-UI-07752-ML-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/17/20
Claimant: Appellant (5)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the March 16, 2021, (reference 02) unemployment insurance decision that denied benefits based upon claimant's voluntary quit. The parties were properly notified of the hearing. A telephone hearing was held on May 10, 2021. The claimant, Todd Enga, participated personally. Claimant's daughter, Zoey Enga, also provided testimony on claimant's behalf. The employer, Crescent Electric Supply Company, participated through Ron Brimeyer. Employer's Exhibits were admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as an Inside/Counter Sales associate. He was employed from July 21, 2020, until February 16, 2021. Claimant's job duties included assisting customers in-person and over the phone. Ron Brimeyer was claimant's immediate supervisor.

Between July 21, 2020, and December 2, 2020, claimant had missed 73.7 hours of work due to sick time and other non-work related absences. According to employer, this amount far exceeds the number of sick days allowed by company standards.

On December 2, 2020, claimant was issued a final warning in response to his continued problems with absenteeism and leaving early. Claimant had incurred 12 incidents of early outs and absenteeism since his last warning on October 6, 2020. As a result of his attendance issues, claimant was required to sign off on an action plan of sorts. The plan provided that claimant could not have any absence, early out, or tardy occur for a period of 30 days, excluding time off related to FMLA and/or state law, planned and pre-approved vacation time, or bereavement. After the successful completion of the 30-day period, claimant could not have any more than one absence, early out, or tardy in any rolling 60-day period. Lastly, the plan provided that if claimant was going to be absent or tardy, he had to "speak to me Ron Brimeyer and not leave a voicemail or text", and, if claimant was going to miss work due to illness, he was

required to bring in a doctor's excuse. The disciplinary action form concluded by stating, "You must meet these expectations immediately and permanently. Failure to meet this directive or any other performance issues or policy violations will result in your immediate termination." Claimant signed the document on December 2, 2020.

Similarly, claimant was issued a final warning in response to his continued problems with unsatisfactory work performance on February 11, 2021. According to the disciplinary action form, claimant had fallen short of his monthly sales goal, he had failed to target his previous customers as instructed by management, he had failed to keep the displays at his counter area full of product, and he had not made any outbound sales calls the week of February 8, 2021. The evidentiary record also describes unsatisfactory incidents occurring on August 13, 2020, and September 9, 2020. As a result of his unsatisfactory work performance, claimant was required to sign off on a separate action plan meant to correct the aforementioned shortcomings. Like the disciplinary action form relating to claimant's attendance issues, the February 11, 2021, form concluded by stating, "You must meet these expectations immediately and permanently. Failure to meet this directive or any other performance issues or policy violations will result in your immediate termination." Claimant signed the document on February 11, 2021.

The final incident occurred on February 11, 2021. As alluded to in the above paragraph, Mr. Brimeyer had called a meeting with claimant to discuss his ongoing problems with unsatisfactory work performance. After the meeting, claimant texted Mr. Brimeyer that he was not feeling well and he would not be at work for his regularly scheduled shift on Friday, February 12, 2021. Claimant did not provide a doctor's note or medical excuse when he returned to work on Monday, February 15, 2020. As noted above, claimant's written warning, dated December 12, 2020, provided that claimant needed to call, not text, Mr. Brimeyer if and when he was not going to be able to make it into work. Claimant was also required to bring in a medical excuse. Claimant failed to fulfill either requirement.

On Monday, February 15, 2020, claimant left work three hours early without discussing his departure with Mr. Brimeyer or anyone else in management. Claimant testified that he told his counter partner Marty that he needed to leave early because his wife had slipped and fell.

Mr. Brimeyer terminated claimant when he presented to work on Tuesday, February 16, 2021. Claimant was discharged for absenteeism and unsatisfactory job performance. Claimant declined to sign the termination notice form presented to him on the morning of February 16, 2021.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

As a preliminary matter, I find that Claimant did not quit. Claimant was discharged from employment for job-related misconduct.

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(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.

The employer has the burden of proof in establishing disqualifying job misconduct. Iowa Code § 96.6(2); *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code

definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a “wrongful intent” to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer’s interests. *Henry v. Iowa Dep’t of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

Insubordination can manifest in several different ways. An employer has the right to expect an employee to follow reasonable directions. *Myers v. Iowa Dep’t of Job Serv.*, 373 N.W.2d 507 (Iowa Ct. App. 1985). Willful misconduct can be established where an employee manifests an intent to disobey a future reasonable instruction of his employer. *Id.* Misconduct can be found when a claimant was discharged for refusing to complete job tasks after his shift because he created the extra job tasks by working too slow. *Boyd v. Iowa Dept. of Job Serv.*, 377 N.W.2d 1 (Iowa Ct. App. 1985). Continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). The refusal of a prison guard to answer questions on his private drug use constitutes job misconduct since the prison’s rule requiring him to disclose this information was necessary to the functioning of the prison system. *Ross v. Iowa State Penitentiary*, 376 N.W.2d 642 (Iowa App. 1985). However, if the request was unreasonable or the claimant had a good faith belief or good cause to refuse the request, no misconduct would be found. *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa Ct.App.1982)(an employee’s failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause).

An instruction is reasonable if it presents no hardship to the employee and no threat to his or her health, safety, or morals. See *Endicott v. Iowa Dep’t of Job Services*, 367 N.W.2d 300, 304 (Iowa App. 1985)(finding misconduct based on employee’s unreasonable refusal to work overtime after employer’s short-notice request). In this case, clearly the instructions claimant received were reasonable given the fact that they presented no hardship to the claimant and no threat to his health, safety or morals. Further, claimant had been on notice of the instructions since December 2, 2020, when he first signed off on the disciplinary action form.

In the alternative, even if claimant was not insubordinate, claimant’s absences were unexcused and excessive.

Iowa Admin. Code r. 871-24.32(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.

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. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep’t of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding “rule [2]4.32(7)...accurately states the law.” The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp’t Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins*, 350 N.W.2d at 192 (Iowa 1984).

In this case, the claimant had received multiple verbal and written warnings for attendance issues. After accumulating 12 incidents of early outs and absenteeism between October 6, 2020, and December 2, 2020, claimant was provided a final written warning on December 2, 2020. Claimant missed work on Friday, February 12, 2021, and left early from work on Monday, February 15, 2021. He did not properly report the absence or the early out as detailed in the

December 2, 2020, disciplinary action plan. In light of claimant's past acts, I find that his absenteeism was excessive.

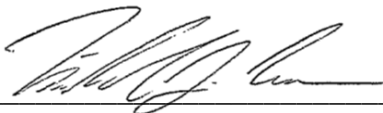
Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

The claimant knew that he needed to come to work on time. He understood the attendance policy and knew that he needed to report any absences prior to his scheduled shift start times. Claimant signed off on a disciplinary action plan that required him to call, not text, Mr. Brimeyer when he was going to be absent from work. The action plan also provided that he needed to bring in a medical excuse or doctor's note if the reason for his absence was related to an illness. The action plan provided that failure to meet the requirements of the action plan would result in the termination of claimant's employment with the employer. Claimant did not meet the requirements of the action plan. I find claimant's absences were not properly reported and were therefore unexcused.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final incidents on February 12, 2021, and February 15, 2021 were not properly reported, and therefore were unexcused. The final absences, in combination with the claimant's history of unexcused absenteeism and unsatisfactory job performance, amount to job-related misconduct. Benefits are denied.

DECISION:

The March 16, 2021 (reference 02) unemployment insurance decision is MODIFIED. The claimant was discharged from employment due to job-related misconduct. Benefits must be denied, and employer's account shall not be charged. This disqualification shall continue until claimant has earned wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is not otherwise disqualified or ineligible.



Michael J. Lunn
Administrative Law Judge
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June 9, 2021
Decision Dated and Mailed

mjl/scn