

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARK W SEIGFRIED

Claimant

APPEAL NO. 12A-UI-00134-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

BAGCRAFTPAPERCON II LLC

Employer

OC: 12/04/11

Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated December 30, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 31, 2012. Claimant participated. The employer responded to the hearing notice and provided the name and telephone number of a representative. When that number was called 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 failed to call during the record and before the record was closed. The record consists of the testimony of Mark Seigfried.

ISSUE:

Whether the claimant was discharged for misconduct.

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 employer manufactures hamburger wrappers at its facility in Fort Madison, Iowa. The claimant was hired on January 8, 2007. His last day of work was December 5, 2011. He was terminated on December 5, 2011. At the time of his termination he was a full time press operator.

The incident that led to the claimant's termination occurred on December 5, 2011. The claimant's shift started at 2:00 a.m. The claimant lives in Illinois and has to cross the Mississippi River to get to work. The bridge that he uses opens for barge traffic and he cannot get through. There is also a train track that blocks his way to work. The claimant took extra time to avoid being late but in a twelve-month period he had four tardies due to bridge closure or train closure. The claimant's other points were accumulated for personal illness and a conference at his daughter's school.

The employer's policy is a no fault point policy and calls for termination at eight points within a twelve-month period. The claimant got a written warning at six points. At seven points he was supposed to receive counseling and that counseling never took place. An instance of tardiness was one half point if it was less than two hours. Sick days were a full point.

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(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 transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984) Absence due to illness and other excusable reasons is deemed

excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7). The employer has the burden of proof to establish misconduct.

The employer did not participate in the hearing and therefore there was no evidence from the employer on why the claimant was terminated and what absences were considered and how. Based on the claimant's testimony, most of the claimant's points were due to personal illness, which is considered an excused absence under Iowa law. The claimant's difficulties getting to work, on the other hand, are transportation problems and are considered unexcused. These instances of tardiness were worth only one half point. The claimant also testified that he did not receive his final counseling session and had that session occurred, he felt that some of these issues could have been worked out with the employer.

The administrative law judge concludes that there is insufficient evidence in this record to conclude that the claimant was discharged for excessive unexcused absenteeism. At least half of the claimant's points were due to personal illness. In addition, the employer did not follow its own policies when it failed to give the claimant a counseling session at seven points. Since there is insufficient evidence of misconduct, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated December 30, 2011, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs