

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THOMAS R SAND
Claimant

APPEAL NO. 08O-UI-07259-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PARKS OF IOWA LC
Employer

OC: 05/11/08 R: 03
Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Parks of Iowa, filed an appeal from a decision dated June 10, 2008, reference 02. The decision allowed benefits to the claimant, Thomas Sand. After due notice was issued, a hearing was held by telephone conference call on August 26, 2008. The claimant did not provide a telephone number where he could be contacted and did not participate. The employer participated by Manager Brent LaPoint.

ISSUE:

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

FINDINGS OF FACT:

Thomas Sand was employed by Parks of Iowa from November 29, 2006 until May 9, 2008 as a full-time wash attendant. He had been given a written warning on July 11, 2007, regarding his attendance. The warning notified him he had ten attendance points even though the company policy calls for discharge at six points.

His attendance improved after that but began to deteriorate again in December 2007. From December 12, 2007 until May 8, 2008, he was absent four full days and tardy 13 times. The final occurrence was on May 8, 2008, when he called in absent 30 minutes prior to the shift as required. The next day Manager Brent LaPoint asked him why he had been absent and Mr. Sand stated he had not been feeling well. The manager discharged him at that point.

REASONING AND CONCLUSIONS OF 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(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.

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.

The claimant was discharged for a final occurrence of absenteeism. However, the absence was due to illness and was properly reported. Although the other absences may have been unexcused, the final occurrence was not. See Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Without a current, final act of misconduct that precipitates the discharge, disqualification may not be imposed under the provisions of the above Administrative Code section.

DECISION:

The representative's decision of June 10, 2008, reference 02, is affirmed. Thomas Sand is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeyer
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw