

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RYAN K GILL
Claimant

APPEAL NO. 09A-UI-09738-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

AG PROCESSING INC A COOPERATIVE
Employer

OC: 05/24/09
Claimant: Appellant (1)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated July 1, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on July 22, 2009. Claimant participated. Employer participated by Ernie Kiley, Soy Operations Manager, and Travis Robinson, energy center superintendent. The employer was represented by Jennifer Coe, a hearing representative with TALX. The record consists of the testimony of Ernie Kiley; the testimony of Travis Robinson; the testimony of Ryan Gill; and Employer's Exhibits One through Three.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer in this case processes soybeans into soybean oil and soybean meal. As part of its operations, the employer also operates a power plant. The claimant was hired on June 13, 2007, as a utility person. The employer had a written employee handbook that was given to claimant and the claimant acknowledged receipt of that handbook. The employer had a specific policy against the presence of any cameras in the workplace. The employer had two reasons for this rule: protection of confidential processes and safety. A lot of heavy equipment was used in the employer's production processes and it was necessary for workers to keep focused at all times.

The claimant was aware of the employer's policy against the use of cameras and cell phones in the workplace. His cell phone had a camera on it.

The final incident that led to the claimant's termination occurred on May 21, 2009, at approximately 7:35 a.m. The claimant was scheduled to work from 7:00 a.m. to 3:30 p.m. He had a break at 9:00 a.m. and a lunch break and then an afternoon break. He was permitted to

use his cell phone on his breaks. Travis Robinson saw the claimant texting on his cell phone when he came into the ash silo to give the claimant some instructions. The claimant tried to hide his cell phone. Mr. Robinson did not say anything to claimant at that time, but returned approximately 10 -15 minutes later with the claimant's supervisor. The claimant was again using his cell phone. The claimant was asked to go downstairs and punch out his time card.

The claimant was then asked why he had his cell phone and his response was "I don't care, I knew I would be gone anyway due to my past." The claimant then went into Mr. Kiley's office and he produced his cell phone from a pocket in his coveralls. He was suspended without pay pending an investigation. The claimant was then terminated per a letter to him dated May 22, 2009. The effective date of the termination was May 21, 2009.

The claimant had had previous warnings concerning attendance. On April 13, 2009, he was given a final written warning and suspension without pay due to tardiness on March 11, 2009, and April 10, 2009. The claimant overslept. He was also given a written warning on February 13, 2009, for an absence on work on February 4, 2009, and a tardy on February 12, 2009. This tardy was due to oversleeping and the absence for a doctor's appointment. However, the claimant did not notify his supervisor that he would not be in for work. He was given a verbal warning on February 5, 2009, for three separate absences since January 1, 2009. The claimant did not notify his employer that he would be gone until after his shift began.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits is found in deliberate acts or omissions that constitute a material breach of the worker's duty to the employer or in repeated acts of carelessness or negligence. One form of misconduct is excessive unexcused absenteeism, which includes tardiness. Oversleeping is a matter of personal responsibility and is not considered an excused absence. Absence due to illness is deemed excused if the employee properly notified the employer.

In this case, the final incident that led to the claimant's termination was a deliberate violation of a known rule against the use of cameras in the workplace. The claimant agreed that he knew that if he used his cell phone on the work site and he was not on a company authorized break, that he was violating his employer's policy. The employer took this policy very seriously and the employee handbook specifically stated that violation of this policy could lead to termination. The claimant was nevertheless seen using his cell phone on two separate occasions in the ash silo. His explanation that he was waiting for a doctor's call is not credible. First, the claimant never told his employer about that reason when he was confronted with the cell phone usage. Second, his cell phone had a voice mail feature and the claimant could have returned a call or had the doctor call the plant if this was such an urgent matter.

The claimant had had prior incidents concerning attendance and knew that his job was in jeopardy. He had been given a final written warning and suspension without pay for job performance on April 13, 2009. The claimant had been tardy on two occasions because he overslept. Although being absent for back problems might have been an excused absence, this is not credible evidence that the claimant properly notified his employer about his absences. The employer has, therefore, sustained its burden of proof that the claimant was discharged for misconduct. Benefits are denied.

DECISION:

The decision of the representative dated July 1, 2009, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs