

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

RICARDO A CARROLL
Claimant

APPEAL NO. 14A-UI-11030-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

REMEDY INTELLIGENT STAFFING INC
Employer

**OC: 03/09/14
Claimant: Appellant (2/R)**

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Recovery of Overpayment of Benefits
871 Iowa Admin. Code Rule 24(10) – Repayment of Benefits

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated October 16, 2014, reference 02, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on November 13, 2014. Employer participated by Rachel Weatherly. Claimant failed to respond to the hearing notice and did not participate.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: As employer was the only participant in the hearing, all findings of fact are gleaned from employer's testimony. Claimant last worked for employer on September 18, 2014. Employer discharged claimant on September 18, 2014 because of excessive absenteeism and tardiness.

Claimant was hired on June 9, 2014. Between hire and discharge date, claimant was late or absent on ten occasions. On none of these occasions where claimant called off ill did he ever provide a doctor's note for himself or an ill child. Claimant received a verbal warning for unexcused absenteeism on August 14, 2014. Claimant received a written warning on August 21, 2014 when he called off work for a doctor's visit, but never provided the doctor's note.

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.

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(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.

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. *Sallis v. EAB*, 437 N.W.2d 895 (Iowa 1989). *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three incidents of tardiness or absenteeism after a warning has been held misconduct. *Clark v. Iowa Department of Job Service*, 317 N.W.2d 517 (Iowa Ct. App. 1982). While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning absenteeism and tardiness. Claimant was warned concerning this policy.

The last incident, which brought about the discharge, constitutes misconduct because claimant knew of his numerous absences and his precarious employment situation with employer but still did not contact employer in advance of his leaving work early on September 18, 2014. Claimant received an employee handbook advising that employer is to be contacted at least two hours before leaving work and claimant did not do this. Additionally, claimant did not provide a doctor's note after his visit. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

Employer is deemed to have sufficiently participated in fact finding such that employer's account will not be charged in this matter.

Claimant is deemed to have been overpaid UI benefits in this matter. This matter will be remanded to the fact finder for a determination as to the amounts of overpayment.

DECISION:

The decision of the representative dated October 16, 2014, reference 02, is reversed. 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.

Employer is deemed to have sufficiently participated in fact finding such that employer's account will not be charged in this matter.

Claimant is deemed to have been overpaid UI benefits in this matter. This matter will be remanded to the fact finder for a determination as to the amounts of overpayment.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

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