

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GUILLERMO HERRERA
Claimant

APPEAL NO. 07A-UI-08634-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**FLEETGUARD INC
CUMMINGS FILTRATION**
Employer

OC: 08/12/07 R: 02
Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Guillermo Herrera (claimant) appealed a representative's September 6, 2007 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Fleetguard, Inc. doing business as Cummings Filtration (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 25, 2007. The claimant participated in the hearing and was represented by personal representative Jacqueline Laurenzo, who also offered testimony on his behalf. Anita Vogt appeared on the employer's behalf. Ike Rocha served as interpreter. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on May 18, 1998. He worked full time as a production assembler in the employer's oil and gas filter manufacturing business. His normal schedule was 6:45 a.m. to 3:45 p.m., Monday through Friday plus posted mandatory overtime. His last day of work was August 16, 2007. The employer discharged him on that date. The reason asserted for the discharge was violation of the employer's attendance policy.

The employer allows employees to take up to 40 hours of unplanned time off per year. On March 19, the claimant was absent from work due to taking his girlfriend, Ms. Laurenzo, to the hospital. This brought him past the 40-hour level of unplanned time off, and on March 22 he was given a documented verbal warning. August 11 was a Saturday which had been posted as mandatory overtime; however, the claimant was absent for that shift as he had decided to stay home to be available to handle phone calls with his brother regarding some medical treatments his mother in Florida was receiving. As a result, on August 15 the claimant was given a written warning and suspension which indicated that he was at 48.75 hours of unplanned hours. He

was further notified that if he missed any more work he was subject to discharge. Ms. Vogt, a human resources associate and an interpreter, read the claimant the warning and suspension document and further explained to him in Spanish that while the suspension was going to be a working suspension rather than days off work, he could not miss any more work. The claimant signed the warning and suspension.

In the early morning August 16 the claimant had been awaiting a follow up telephone call from his brother regarding his mother's care, and dozed off. He then awoke and went to work, arriving approximately ten minutes late. He acknowledged to Ms. Vogt with the claimant's supervisor that he was late because he had overslept. As a result of this incident after the prior warning and suspension, the employer discharged the claimant.

REASONING AND CONCLUSIONS OF LAW:

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. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

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(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.

Tardies are treated as absences for purposes of unemployment insurance law. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The presumption is that oversleeping is generally within an employee's control. Higgins, supra. The claimant's final attendance occurrence of being tardy was not excused and was not due to illness or other reasonable grounds outside his control. The claimant had previously been warned that future missed work could result in termination. Higgins, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's September 6, 2007 decision (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of August 16, 2007. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css