IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

AARON L NIELSEN
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MANLY IA 50456-0365

LARRY ELWOOD CONSTRUCTION INC
2401 S. FEDERAL AVE
MASON CITY IA 50401

Appeal Number: 05A-UI-12254-RT
OC: 11/13/05 R: 02
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Larry Elwood Construction, Inc., filed a timely appeal from an unemployment insurance decision dated December 2, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Aaron L. Nielsen. After due notice was issued, a telephone hearing was held on December 20, 2005, with the claimant participating. The employer did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. The administrative law judge takes official notice of Iowa Workforce Development Department records for the claimant

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time carpenter/laborer from June of 2004 until he was discharged on November 8, 2005. The claimant was discharged for not working fast enough on a weekend project assigned to him as extra work by the employer. The claimant was assigned to work on a garage on the weekend, which was above and beyond his normal work. He was asked to do this as a favor to the employer for cash on the side. The claimant only worked one weekend putting stain on the garage. The employer believed that the claimant was not doing it fast enough and discharged the claimant. However, the claimant was working at the job appropriately but simply did not finish the stain application before the weekend was over. The claimant was not told that he was discharged for his performance.

The claimant did have attendance issues in the past. However, within the last four months before his discharge, the claimant had only been absent for one week for an infected tooth, which caused his face to swell up. The claimant informed the employer appropriately of these absences and the employer excused those absences. During the last four months of the claimant's employment he had no tardies and received no warnings for his attendance.

Pursuant to his claim for unemployment insurance benefits filed effective November 13, 2005, the claimant has received unemployment insurance benefits in the amount of $1,140.00 as follows: $285.00 per week for four weeks, from benefit week ending November 19, 2005 to benefit week ending December 10, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 credibly testified, and the administrative law judge concludes, that he was discharged on November 8, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including, excessive unexcused absenteeism. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, including excessive unexcused absenteeism. The employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence, any of which would establish disqualifying misconduct. The employer also did not provide sufficient evidence of current absences or tardies not for reasonable cause or personal illness and not properly reported so as to establish excessive unexcused absenteeism and disqualifying misconduct.

The claimant credibly testified that he was discharged for not working fast enough on an extra job assigned to him on the weekend. The claimant was to stain a garage on the weekend, which job was above and beyond his normal work. The claimant was asked to do this as a favor for cash on the side. The claimant only worked one weekend applying stain. The employer did not believe that the claimant was working fast enough and discharged the claimant. The claimant credibly testified that he was working on the job appropriately. There is no evidence of any deliberate acts or omissions by the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence so as to establish disqualifying misconduct. At most, the claimant's actions were mere inefficiency, unsatisfactory conduct, or failure in good performance and are not disqualifying misconduct. Accordingly, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

The claimant credibly testified that when he was discharged, he was not told that attendance was the reason for his discharge. Nevertheless, the claimant credibly testified that he did have attendance issues in the past but for the claimant's last four months of employment he was only absent one week and this for an infected tooth, which caused his face to swell and he needed to be off of work during that time for the swelling to go down so he could fix the tooth. The claimant credibly testified that he informed the employer of this and the employer excused these absences. The administrative law judge concludes that these absences were for personal illness and properly reported and not excessive unexcused absenteeism. The claimant credibly testified that he had no tardies and no warnings in the last four months of his employment. The claimant conceded that he had some attendance issues in the past. However, a discharge for misconduct cannot be based on past acts. Any of the claimant's attendance problems would have been past acts and cannot be the basis for a disqualification after the fact. It is true that past acts and warnings can be used to determine the magnitude of the current act of misconduct but the administrative law judge finds no current acts of excessive unexcused absenteeism or other disqualifying misconduct.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
>
> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment

compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $1,140.00 since separating from the employer herein on or about November 8, 2005 and filing for such benefits effective November 13, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of December 2, 2005, reference 01, is affirmed. The claimant, Aaron L. Nielsen, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

dj/kjw