IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MICHAEL L FOX
Claimant

SECURITAS SECURITY SERVICES USA
Employer

APPEAL NO: 06A-UI-08451-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/16/06 R: 04
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Securitas Security Services, USA (employer) appealed a representative's August 16, 2006 decision (reference 01) that concluded Michael L. Fox (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 13, 2006. The claimant participated in the hearing. Kelly Battista of TALX Employer Services appeared on the employer's behalf and presented testimony from two witnesses, Trisha Vollmer and Paul Booth. 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 November 18, 2005. He worked full time as a security officer at the employer's Davenport, Iowa, business client. His last day of work was June 22, 2006. The employer discharged him on June 30, 2006. The reason asserted for the discharge was a final issue of excessive absenteeism following job performance issues.

The claimant had received several documented verbal warnings on performance issues, such as appropriate language and not relaying jokes on the radio; the most recent verbal warning was May 8, 2006. The employer's attendance policy provides that an employee is subject to discharge upon reaching 4.5 points for unexcused absences. On January 30, 2006, the claimant was four minutes tardy and was assessed one point. He had no other absences until June 23 through June 28, 2006. The employer considered these days as unexcused, and therefore ended the claimant's employment.

When the claimant was hired, he had advised the employer up front that he needed to be off work from March 12 through March 18 for an examination process. The employer had agreed

and arranged for this absence. The claimant was not required to submit the time-off request form normally required by the employer's policies. In about mid-February 2006 the claimant verbally informed his supervisor, Mr. Booth, that there was going to be a family reunion for his parents' 50th wedding anniversary in June and he would need to be off work that week. Mr. Booth did not say anything to the claimant about filling out a time-off request form, but simply told him to mark the time down on the calendar kept in the guard office, which the claimant immediately did. The plans for the claimant's traveling for the reunion were discussed by the claimant and Mr. Booth at various other times between February and June 22; Mr. Booth never told the claimant he could not have the time off or that he needed to follow a specific procedure to get permission.

In early June the claimant again reminded Mr. Booth of his upcoming absence and trip; Mr. Booth's only response was that the claimant should send him an email or give him a written note to confirm the dates. The claimant complied. He departed on his trip with nothing further being said by Mr. Booth. However, when he sought to return to work, he was informed that there was not a job for him. The employer decided to terminate his employment because he had not followed the procedure specified by policy to complete a time-off request form, which would have been denied due to a shortage of staff, that the claimant had no time earned available to take off, and that, as a result, his absences from June 23 through June 28 were unexcused, taking him past the discharge point level.

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). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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.

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
   a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
   b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
   a. Manifest equal culpability, wrongful intent or evil design; or
   b. Show an intentional and substantial disregard of:
      1. The employer's interest, or
      2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is his absenteeism, specifically, the days of June 23 through June 28, 2006. While the claimant may not have followed the specified procedure, the admittedly "wishy-washy" responses by Mr. Booth were understandably interpreted by the claimant to be an approval of his request for the time off. Excessive unexcused absences can constitute misconduct; however, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of his job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). Given the claimant's reasonable reliance on Mr. Booth's implicit approval of his time off, the claimant's absences must be treated as unintentional or excused for purposes of determining unemployment insurance benefit eligibility. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's August 16, 2006 decision (reference 01) is affirmed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw