

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AUGUST R BACH
Claimant

APPEAL NO. 08A-UI-04033-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CEMEN TECH INC
Employer

**OC: 03/09/08 R: 03
Claimant: Appellant (2)**

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

August Bach filed an appeal from a representative's decision dated April 14, 2008, reference 01, which denied benefits based on his separation from Cemen Tech, Inc. After due notice was issued, a hearing was held by telephone on May 8, 2008. Mr. Bach participated personally. The employer participated by Debbie Hauk, Human Resources Manager, and Mark Heston, Painting Supervisor.

ISSUE:

At issue in this matter is whether Mr. Bach was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Bach was employed by Cemen Tech, Inc. from April 10 until June 26, 2007. He was employed full time as a painter. He was discharged because of his attendance. He was absent 15 full days during the course of his employment. All of the absences were properly reported and were due to illness. Mr. Bach provided a doctor's statement for at least the bulk of his absences. Prior to June 25, he never left work early without permission. He received warnings about his attendance on June 5 and June 8.

Mr. Bach was scheduled to work on June 25 from 4:30 p.m. until 2:00 a.m. At approximately 8:30 p.m., he notified his supervisor by phone that he might need to leave early. The supervisor was aware of a personal situation that had developed for Mr. Bach at work. His wife, who also worked there, had begun "running around" with two male employees. Having to work with the three of them caused Mr. Bach distress. He was upset on June 25 and told the supervisor that he might need to leave because he was upset but did not specify a time he intended to leave. The supervisor asked that he let him know his plans.

Mr. Bach left work at 9:00 p.m. but did not call the supervisor back to advise of his decision. As a result of his early departure, he was discharged on June 26, 2007. Attendance was the sole reason for the separation.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). An individual who was discharged because of attendance is disqualified from receiving benefits if he was excessively absent on an unexcused basis. Properly reported absences that are for reasonable cause are considered excused absences. The administrative law judge is not bound by an employer's designation of an absence as unexcused.

The administrative law judge concludes that all of Mr. Bach's absences prior to June 25 are excused. The absences were due primarily to illness and were properly reported. He provided a doctor's note to substantiate a number of the absences. Excused absences may not form the basis of a misconduct disqualification, regardless of how excessive and regardless of the fact that an individual has been disciplined as a result of the absences.

Mr. Bach's absence of June 25 is unexcused as it was for personal reasons. He was emotionally distraught because of the behavior of his wife with two male coworkers. The supervisor had been made aware of the situation involving Mr. Bach's wife and the coworkers. He told his supervisor that he might need to leave early as a result of the conduct and the fact that he was upset. Therefore, the employer was not totally without notice that he would be leaving early. Mr. Bach used poor judgment in not re-contacting his supervisor once he made the decision to leave. However, considering the totality of the circumstances, the administrative law judge concludes that the one unexcused absence of June 25 is not sufficient to establish excessive unexcused absenteeism within the meaning of the law.

It was within the employer's prerogative to discharge Mr. Bach. While the employer may have had good cause to discharge, conduct that might warrant a discharge from employment will not necessarily support a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa 1983). For the reasons stated herein, the administrative law judge concludes that disqualifying misconduct has not been established. Accordingly, benefits are allowed.

DECISION:

The representative's decision dated April 14, 2008, reference 01, is hereby reversed. Mr. Bach was discharged but disqualifying misconduct has not been established by the evidence. Benefits are allowed, provided he satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs