

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARSHALL J HROVAT
Claimant

APPEAL NO. 11A-UI-01705-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

BWC INDUSTRIAL SERVICES LC
Employer

OC: 01/09/11
Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated February 3, 2011, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 9, 2011. The claimant participated. The claimant was represented by Robert Wilson, attorney at law. The employer participated by Jimmy Noethe, safety director, and Michael Lyman, general foreman. The record consists of the testimony of Jimmy Noethe; the testimony of Michael Lyman; the testimony of Marshall Hrovat; and Claimant's Exhibits A through K.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer provides industrial clean-up services. The claimant was hired on July 6, 2009, as a full-time laborer/operator. His last day of work was January 5, 2011. He was terminated on January 11, 2011.

The events that led to the claimant's termination began on October 30, 2010 and October 31, 2010. The claimant was a no-call/no-show on both of those days. The claimant was placed on probation until February 7, 2011. If he had another no-call/no-show, further discipline would result.

The employer had a policy, of which the claimant was aware, that any absence had to be reported prior to the start of the shift and the employee had to speak with a supervisor. Three phone numbers were provided: 319-398-0660; 319-899-9987; and 319-899-9986. Mike Lyman, who was the claimant's supervisor, did accept messages left by employees as opposed to actually speaking to them. The start time of a shift would vary, but any absences had to be reported before the shift began.

On January 6, 2011, the claimant's phone records showed that he dialed 319-551-6048 at 6:04 a.m. This is Mike Lyman's personal cell phone. The claimant's testimony on whether he left a message

or spoke to Mike Lyman is not consistent. The employer's phone records show a call made to the claimant at 7:01 a.m. Mr. Lyman called the claimant to ask him why he was not at work. The claimant was called later that afternoon and told to stay home while the matter was reviewed. The claimant was terminated on January 11, 2011, for the no-call/no-show on January 6, 2011. The claimant was absent from work that day because he was ill.

The claimant had been given warnings about his attendance in addition to the attendance probation.

REASONING AND CONCLUSIONS OF LAW:

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(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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7). In order to justify disqualification,

the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8) See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

The claimant was terminated because the employer believed he had a no-call/no-show on January 6, 2011. The claimant had been put on probation as a result of two instances of no-call/no-show on October 30, 2010, and October 31, 2010. The employer's policy required the claimant to call in prior to the start of his shift if he was not going coming to work. On January 6, 2011, the claimant's shift started at 7:00 a.m. The employer placed a call to the claimant at 7:01 a.m. to inquire why he was not at work. The claimant was sick.

If an individual is unable to work because of illness and if he complies with the employer's policy on notification, the absence is considered excused under Iowa law. An excused absence is not misconduct and therefore the claimant would not have been discharged for a current act of misconduct. The issue, therefore, is whether the claimant complied with the employer's notification policy.

The claimant's testimony was not consistent on what he did and is of questionable credibility. Although his phone records show that he made a call to Mike Lyman's personal cell phone at 6:04 a.m., his testimony varied on whether he simply left a message or actually spoke to Mr. Lyman. Mr. Lyman testified that he did not talk to the claimant at 6:04 a.m. and that no message was left for him on his personal cell phone. Mr. Lyman also testified that he called the claimant at the time the shift was starting to ask where the claimant was. A reasonable inference is that if the claimant had talked to Mr. Lyman at 6:04 a.m. or had left a message, Mr. Lyman would not have called him. Mr. Noethe testified that the employer's phone records show that a call was placed to the claimant at 7:01 a.m., which is consistent with Mr. Lyman's testimony.

The administrative law judge concludes that the claimant did not comply with employer's notification policy. He was a no-call/no-show. The evidence established excessive unexcused absenteeism. Benefits are denied.

DECISION:

The representative's decision dated February 3, 2011, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw