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

KEITH A SCHARPMAN
Claimant

APPEAL NO: 11A-UI-00433-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

BURROWS PAPER CORP - ADP
Employer

**OC: 12/12/10
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant appealed a department decision dated January 5, 2011, reference 01, that held he was discharged for excessive unexcused absenteeism on December 13, 2010, and benefits are denied. A telephone hearing was held on February 18, 2011. The claimant participated. Diane Adkisson, HR Administrator, participated for the employer. Employer Exhibit 1 and 2 was received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment on September 5, 1995, and last worked as a full-time former mechanic on December 13, 2010. The claimant's unemployment is covered by a collective bargaining agreement with union representation. The claimant received the employer policies regarding progressive discipline.

The claimant was issued a last-chance agreement (LCA) for excessive absences that he signed for on September 9, 2010. More than half of claimant's absences involved his wife's health issues, but he did not apply for FMLA during the period the employer issued verbal and written warnings for absenteeism. In addition, the claimant had some panic attacks, but he did not try to excuse these occurrences by disclosing the information to the employer and providing doctor excuses.

As a condition of the LCA, claimant was suspended for three days, warned that a further occurrence could result in employment termination, and directed to EAP. EAP released claimant from further participation on November 17, 2010.

The claimant was scheduled to start work at 7:00 a.m. on December 13. He reported to HR at 8:00 a.m., and told Ms. Adkisson he was not fit to work, unsafe to work, because he had been

drinking all weekend. Claimant consented to an alcohol breath test and the testing facility reported to the employer the result was .03 and .025 that morning. The employer sent the claimant home as it concluded he was unsafe to work. On December 14, the employer discharged claimant when he came into work for unexcused absence the day before that violated his last-chance agreement.

The employer did not offer claimant a rehabilitation program for alcoholism due the discharge reason (that is not for violation of its drug/alcohol program). The claimant denies he is an alcoholic, and that he requested help from EAP when he was referred to that program. The union did not grieve claimant's discharge.

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.

The administrative law judge concludes the employer has established that the claimant was discharged for misconduct in connection with employment on December 14, 2010, for excessive unexcused absenteeism.

The claimant knew the employer policy due to a last-chance agreement and his repeated unexcused absence violation for the same type of offense constitutes job disqualifying misconduct. The claimant failed to make a good faith effort to excuse his absences due to his

wife's health issues by seeking FMLA, and his personal absences due to health issues by disclosure to the employer with doctor excuses.

As to the final incident, the claimant chose to drink alcohol to excess prior to reporting for work on December 13 that is voluntary based on his testimony he is not an alcoholic. His absence from work is based on his "unfitness" to work by registering a significant alcohol level. Since claimant was given an opportunity to seek help when the employer sent him to EAP two months prior to discharge, his failure to acknowledge any issue of alcohol in his life does not excuse his subsequent behavior that made him unfit to work.

DECISION:

The department decision dated January 5, 2011, reference 01, is affirmed. The claimant was discharged for misconduct on December 14, 2010. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible.

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Randy L. Stephenson
Administrative Law Judge

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Decision Dated and Mailed

rls/css