

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PATRICK M BALL

Claimant

APPEAL NO. 13A-UI-08898-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SAMS RIVERSIDE AUTO PARTS INC

Employer

OC: 06/30/13

Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated July 23, 2013, reference 01, which held that the claimant was not eligible for unemployment insurance benefits. After due notice, a hearing was held on September 6, 2013, by telephone conference call. The claimant participated personally. The employer failed to respond to the hearing notice and did not participate. The record consists of the testimony of Patrick Ball and Claimant's Exhibits A-K.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

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

The claimant worked for the employer as a full-time car salesman. The claimant usually worked 60 to 65 hours per week. The claimant's last day of work was June 28, 2013. He was terminated on June 28, 2013.

The incident that led to the claimant's termination occurred on June 27, 2013. The claimant called the employer and asked for the day off due to personal problems with his wife. The employer's representative told the claimant that he "would see him tomorrow." When the claimant came to work he was terminated. The claimant had missed five days in June 2013 for medical reasons. He had a doctor's excuse for all of these absences.

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.

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). 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 is eligible for unemployment insurance benefits. The employer failed to participate in the hearing and therefore there is no evidence of misconduct. The claimant was apparently discharged for absenteeism but there is no testimony on what days of absenteeism were considered by the employer. The claimant admitted that he did have five days of absenteeism in June 2013 but these absences were due to illness properly reported. These absences are therefore excused absences. One day of absenteeism, which occurred on June 27, 2013, was the only other absence mentioned by the claimant. Concerning that absence, the claimant had called in and had asked for the day off. The employer's response could have reasonably led the claimant to believe that he had been given permission to have the day off, which would make this absence excused as well. Since there is no evidence of excessive unexcused absenteeism, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated July 23, 2013, reference 01 is reversed. Unemployment insurance benefits are allowed, if the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css