

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSHUA S FERRELL
Claimant

APPEAL NO. 11A-UI-16555-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CLEARY BUILDING CORP
Employer

**OC: 10/30/11
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Cleary Building Corporation filed a timely appeal from a representative's decision dated December 27, 2011, reference 02, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was held on January 30, 2012. Although duly notified, the claimant did not respond to the notice of hearing and did not participate. The employer participated by Mr. Joe McDermott, Branch Manager.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Joshua Ferrell was employed by Cleary Building Corporation for approximately six months until he was discharged on November 26, 2011 for excessive absenteeism and for failure to provide notification of absences. Mr. Ferrell was employed as a full-time crew member and was paid by the hour. His immediate supervisor was Harry Helovocich.

Mr. Ferrell was discharged on November 26, 2011 after he failed to report for work or provide any notification to the employer regarding his impending absences on November 21 and November 22, 2011. The claimant had been warned approximately two weeks before that his attendance was unsatisfactory and the claimant had also been warned that he must provide adequate notice to the employer of impending absences. Company policy requires employees to notify their supervisor or the branch manager prior to the beginning of the work shift if they are unable to report to work.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

Iowa Code § 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 employer has the burden of proof in this matter. See Iowa Code § 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

In the case at hand, the evidence in the record establishes that Mr. Ferrell was aware of the company policy that required employees to notify the employer of impending absences before the beginning of each day's work shift. The claimant had also been specifically warned about the requirement to provide advance notice approximately two weeks before his discharge. The claimant was discharged after he failed to report for scheduled work and did not provide any notification of his impending absences on November 21 and November 22, 2011. The employer's witness does not recall Mr. Ferrell providing any information about extenuating circumstances that caused him to fail to report or provide notification.

No aspect in the contract of employment is more basic than the right of an employer to expect employees will appear for work on the hour and day agreed upon, or in the absence, provide required notification to the employer. Recurrent failure to honor that obligation shows a willful disregard for the employer's interests and reasonable standards of behavior that the employer has a right to expect of its employees under the provisions of the Iowa Employment Security Law. Although claimant had been specifically warned, he was discharged when he again failed to provide notification on two consecutive work days. Unemployment insurance benefits are withheld.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated December 27, 2011, reference 02, is reversed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. An issue of overpayment or whether the claimant is eligible for a waiver of any overpayment is remanded to the Claims Section to determine.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs