

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

PABLO FIERRO  
811 E HOLT  
OTTUMWA IA 52501

TEMP ASSOCIATES  
1000 N ROOSEVELT AVE  
BURLINGTON IA 52601

Appeal Number: 05A-UI-05186-DWT  
OC: 04/17/05 R: 03  
Claimant: Appellant (2)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Pablo Fierro (claimant) appealed a representative's May 6, 2005 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits, and the account of Temp Associates (employer) would not be charged because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known address of record, a telephone hearing was held on June 6, 2005. The claimant participated in the hearing. Debra Eagleman, the branch manager, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer discharge the claimant for work-connected misconduct?

#### FINDINGS OF FACT:

The claimant started working for the employer on December 6, 2004. The employer assigned the claimant to work at Mount Pleasant Foods that same day. The assignment was a temp-to-hire position. The employer told the claimant to contact both Mount Pleasant Foods and the employer any day he was unable to work as scheduled.

When the claimant was unable to work, he notified his supervisor at Mount Pleasant Foods, but not the employer. The claimant received a verbal warning for his attendance on December 22, 2004. On December 30, the claimant received his second warning, which was a written warning for attendance issues. On February 10, 2005, the claimant was late for work. On February 12, 15 and 16, the claimant was not at work because he had fractured his hand. The claimant tried to give his Mount Pleasant Foods supervisor a statement for these absences. The claimant understood the supervisor did not take them because the employer knew he had hurt his hand. On February 17, 2005, the employer gave the claimant another written warning for continuing attendance problems.

In late February 2005 the claimant understood Mount Pleasant Foods was going to hire him as a full-time employee. On March 3, the employer told the claimant that instead of being hired as a full-time employee, Mount Pleasant Foods would extend his probation another 60 days to see if his attendance improved. The employer told the claimant that when he was unable to work as scheduled, he needed to contact the employer and Mount Pleasant Foods.

On March 7, 2005, the claimant was unable to work as scheduled because he unexpectedly had to take his wife to the hospital. The claimant's wife was pregnant and she experienced contractions. The claimant notified Mount Pleasant Foods he was unable to work and why he was unable to work. Mount Pleasant Foods then contacted the employer. On March 7, 2005, the employer discharged the claimant for excessive absenteeism and for failing to contact the employer when he was unable to work as scheduled.

#### REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence

or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The law presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7).

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. 871 IAC 24.32(8).

Based on the previous warnings the claimant received for attendance problems, he knew his job was in jeopardy. Also, the claimant understood he needed to improve his attendance because instead of being hired as a full-time employee, the employer had extended his probation.

On March 7, the claimant did not intentionally fail to work as scheduled. Instead, he had to unexpectedly take his wife to the hospital because she was experiencing contractions. Even though the claimant did not properly notify the employer that he was unable to work as scheduled, he notified his Mount Pleasant Food's supervisor.

The employer established business reasons for discharging the claimant. The claimant did not commit work-connected misconduct because he established a justifiable reason for not working as scheduled as on March 7 and his Mount Pleasants Food supervisor knew why he was not at work. Therefore, as of April 17, 2005, the claimant is qualified to receive unemployment insurance benefits.

**DECISION:**

The representative's May 6, 2005 decision (reference 01) is reversed. The employer discharged the claimant for business reasons that do not constitute work-connected misconduct. As of April 17, 2004, the claimant is qualified to receive unemployment insurance benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

dlw/tjc