

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EUGENE SMITH

Claimant

APPEAL NO: 08A-UI-01124-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BERTCH CABINET MFG INC

Employer

**OC: 12/23/07 R: 03
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Eugene Smith (claimant) appealed a representative's January 22, 2008 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Bertch Cabinet Manufacturing, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 18, 2008. The claimant participated in the hearing. Mitzi Tann appeared on the employer's behalf and presented testimony from one other witness, John Henson. 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:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

After a prior period of employment for the employer through a temporary employment firm, the claimant started working directly for the employer on November 1, 2004. He worked full time as a component processing applicator on the third shift in the employer's rough mill. His last day of work was March 13, 2007. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism.

The employer allows employees four absences due to illness and three unexcused absences in a 12-month period before termination would occur. As of June 12, 2006 the claimant had already used his four sick days. He was then again absent for illness on June 12, 2006, September 19, 2006 and November 14, 2006. Normally, he would have been discharged at that point; however, the employer then discovered that the claimant had not been given the ordinary warnings for his three unexcused absences due to illness. As a result, on November 16 he was given a six-month probation during which he was advised he could have no tardy or unexcused absence.

The claimant's shift started at 10:30 p.m. He normally got a ride to work with a coworker. On March 11, 2007, the claimant did not clock in until 11:19 p.m. The reason he was late was that

the coworker with whom he got a ride had forgotten to set his clock forward that day due to the change in daylight savings time. The claimant realized the coworker was going to be late as the time approached 10:30 p.m. and started trying to find other means of transportation; before he was successful in securing alternate transportation, the coworker arrived and took the claimant to work.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Because of the necessary element of intent for an employee's action to be misconduct, an absence due to circumstances that are completely outside of an employee's reasonable scope of control are deemed excused for purposes of unemployment insurance benefit eligibility. Cosper, supra. Because the prior absences were all due to properly reported illness and the final incident of tardiness was due to a reason realistically outside of the claimant's control or ability to foresee, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's January 22, 2008 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs