

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LUTHER D PIERCE
Claimant

APPEAL NO. 14A-UI-01350-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CLIFF VISSMAN INC
Employer

**OC: 01/05/14
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated January 30, 2014, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a hearing was held on February 26, 2014, by telephone conference call. The claimant failed to respond to the hearing notice and did not participate. The employer participated by Dave Vogt, director of special projects; Jeff Harding, corporate accounts; and Brett Brown, wash bay supervisor. The record consists of the testimony of Jeff Harding and the testimony of Brett Brown. Official notice is taken of agency records.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

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

The employer is an over-the-road hauling company that handles special products. The claimant was hired on November 1, 2013, as a wash bay technician. The claimant worked at the employer's facility in Cedar Rapids, Iowa. He was a full-time employee. His last day of work was January 6, 2014. He was terminated for excessive unexcused absences on January 6, 2014.

The claimant was tardy on December 1, 2013, and December 8, 2013. He overslept on both occasions. He received written warnings on December 2, 2013, and December 9, 2013, for each of the absences. The claimant was a no call/no show on December 31, 2013. Although he did not report for work on December 31, 2013, he did show up at the employer's facility to wash his own vehicle. The employer has a policy that if an employee is going to absent the employee must call in a minimum of one hour prior to advance of the start of the shift.

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). The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such as transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). The employer has the burden of proof to show misconduct.

The claimant is not eligible for unemployment insurance benefits. The evidence showed that the claimant was hired on November 1, 2013, and prior to his termination on January 6, 2014, he had three instances of unexcused absenteeism. He was given a warning after the first two absences and therefore likely knew that his job was in jeopardy. His final absence was a no call/no show on December 31, 2013. Although he did not come to work, he did come to the employer's place of business and washed a personal vehicle. It is unlikely, therefore, that he was ill and could not work. Since the employer has shown excessive unexcused absenteeism, benefits are denied.

The hearing notice included the issue of overpayment of benefits. The claimant has not made any weekly claims and has been paid no weekly benefits. The overpayment issue is therefore moot.

DECISION:

The decision of the representative dated January 30, 2014, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs