

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOEY L GUY
Claimant

APPEAL NO. 11A-UI-15432-AT

**ADMINISTRATIVE LAW JUDGE
DECISION**

M & L MASONRY INC
Employer

OC: 04/17/11
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

M & L Masonry filed a timely appeal from an unemployment insurance decision dated November 22, 2011, reference 02, that allowed benefits to Joey L. Guy. After due notice was issued, a telephone hearing was held December 29, 2011 with Mr. Guy participating and presenting additional testimony by Dave Meidinger. Office Manager Steve DeMent, Owner Rick Leitheiser and Brick Foreman Jody Albrecht participated for the employer. The administrative law judge takes official notice of Agency benefit payment records.

ISSUE:

Was the claimant discharged for misconduct in connection with the employment?

FINDINGS OF FACT:

Joey L. Guy was employed as a bricklayer by M & L Masonry, Inc. from February 15, 2011 until he was discharged October 21, 2011. Mr. Guy had been absent without contact on October 20, 2011. He was absent under similar circumstances on October 10, 2011 as well. He was tardy on October 4 and October 7, 2011. He had also been absent without contact on September 29 and 30, 2011.

In early October, Owner Rick Leitheiser had spoken to the crew, asking them to be sure to show up for work regularly to finish their project before it was closed down for the winter. Brick Foreman Jody Albrecht specifically gave verbal warnings to Mr. Guy in both September and October about his attendance. The crew continued working until mid-November 2011.

Mr. Guy has received unemployment insurance benefits since filing an additional claim effective October 23, 2011.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence establishes that the claimant was discharged for misconduct in connection with the employment. It does.

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.

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 medical conditions is considered excused only if the individual properly reports the absence to the employer. See 871 IAC 24.32(7). While Mr. Guy's absences may have been related to a sore shoulder, it is clear from the record that he did not give the employer advance notice of his impending absences. The evidence establishes excessive unexcused absenteeism.

The fact-finding decision indicated that Mr. Guy was discharged as part of a staff reduction. The evidence establishes that the employer kept the crew together through mid-November in an attempt to complete an outdoor project prior to winter weather.

Iowa Code section 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.

The question of whether the claimant must repay the benefits he has received is remanded to the Unemployment Insurance Services Division.

DECISION:

The unemployment insurance decision dated November 22, 2011, reference 02, is reversed. Benefit are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The question of repayment of benefits is remanded.

Dan Anderson
Administrative Law Judge

Decision Dated and Mailed

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