

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN A RICCIO
Claimant

CITY OF DES MOINES
Employer

APPEAL NO. 09A-UI-18682-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/01/09
Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(1) – Definition of Misconduct

STATEMENT OF THE CASE:

The claimant appealed a department representative's decision dated December 7, 2009, reference 01, that held the claimant was discharged for misconduct on November 3, 2009, and benefits are denied. A telephone hearing was held on February 10, 2010. The claimant, and his Attorney, Jerry Jackson, participated. James Wells, HR Manager of Employee Services, and Carol Moser, Assistant City Attorney, participated for the employer. Employer Exhibits One thru Nine, and Claimant Exhibit A was received as evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses, and having considered the evidence in the record, finds that: The claimant began full-time employment on September 25, 1995. The claimant worked full-time as a street sweeper operator until he suffered a job related back injury (April 2006) that made him eligible for worker's compensation. The employer has a J-Time supplement pay program in addition to temporary total worker's compensation disability that allows an employee to receive regular pay for each day off work.

In early October 2009, an employee complained to HR Manager Wells that the claimant was working elsewhere, and bragging about it while co-workers knew he was off work and receiving employer pay. Wells initiated an investigation that led the employer to hire a private business firm to conduct a surveillance of the claimant's activities.

The private business issued a surveillance report with video to the employer on October 12, 2009 that monitored the claimant's activities for four days (10/7, 8, 10 & 11). The report observed the claimant working as a night security guard for Casey's in Ankeny, Iowa, and performing some yard-work at his residence using a hedge-trimmer. The claimant monitored Casey's trucks coming in and out of the security gate, talking on his phone, and walking in and around the guard shack without the use of a cane.

The employer confirmed through its worker's compensation attorney who contacted Casey's that claimant worked a part-time security job. Casey's time record showed the claimant worked a shift from 6:50 a.m. to 9:21 a.m. on September 18 (Friday), and 8.17 hours for a shift on October 9. The employer paid the claimant 8 hours of pay for each day (7:00 a.m. to 3:00 p.m.).

The claimant was treated for his back injury by physicians at Des Moines Orthopaedic Surgeons PC who would submit medical evaluation reports to the employer's worker's compensation medical provider, Des Moines University Clinic. The clinics' physicians would issue work status reports for the employer as to whether the claimant could work, and if so, any restrictions on that activity. The clinic issued reports on August 28 and September 29 that claimant is unable to work at this time (with cane/crutches).

The employer worker's compensation department forwarded the investigative information to the worker's compensation administrator who issued an Auxier Notice letter dated October 22, 2009. The letter informed the claimant the employer's J-Time benefit is suspended effective October 16, and his (TTD) worker's compensation would end November 21, because he returned to work with another employer.

After conducting a pre-disciplinary hearing on October 28, the employer notified the claimant on November 2, 2009 that he was discharged for working outside of his restrictions while off work and receiving work injury benefits.

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.

The administrative law judge concludes that the employer has established misconduct in the discharge of the claimant on November 2, 2009, for violating worker's compensation restrictions by off duty work and receiving full pay from the employer.

The record establishes that claimant was restricted from all work by the physician work status reports from August through late October 2009, which entitled him to receive full employer pay for his regular job through worker's compensation (TTD) and the supplemental J-Time program. The employer established that the claimant violated the work restrictions by working at Casey's during the period he received employer pay, and on at least two occasions, receiving pay for the same day from both employers.

Employee honesty is a standard of behavior the employer has a right to expect. Flescher v. IDJS, 372 NW2d 230 (Iowa 1985). The claimant knew he was receiving his regular employer pay for being off work due to a back injury that restricted him from any work. There is no credible evidence that the claimant disclosed to his treating physicians or the employer or its medical provider staff of his security job at Casey's. The claimant knew he was receiving full pay from the employer for not working, and on at least two occasions, received that and Casey's pay.

DECISION:

The department representative's decision dated December 7, 2009, reference 01, is affirmed. The claimant was discharged for misconduct in connection with employment on November 2, 2009.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs