

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JAMES L SCOTT**  
Claimant

**APPEAL NO. 11A-UI-11328-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GORDMANS**  
Employer

**OC: 04/17/11  
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from a representative's decision dated August 25, 2011, reference 01, which denied unemployment insurance benefits. After due notice was issued, a telephone hearing was held on September 21, 2011. The claimant participated personally. The employer participated by Ms. Angela Rodenburg, human resource manager.

**ISSUE:**

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered the evidence in the record, the administrative law judge finds: James Scott was employed by Gordmans from May 4, 2011, until July 26, 2011, when he was discharged for excessive absenteeism. Mr. Scott was employed as a part-time freight handler and was paid by the hour.

The claimant was discharged after he had been excessively absent during his 90-day probationary period. Under established company policy, employees who are absent on three or more occasions during a probationary period are subject to discharge. Mr. Scott was aware of the rule.

On July 19, 2011, the claimant left early to provide additional care for his children who were ill. The mother of the children was present; however, Mr. Scott felt it was necessary for him to leave early. On July 20, the claimant called in and left a message that he would absent. Although the supervisor attempted to call Mr. Scott back on two occasions that day, he did not receive an answer at the claimant's residence, and messages were not returned. Mr. Scott had arranged in advance to be off on July 21 and 22. Although plans to attend a wedding did not materialize, the claimant did not attempt to rescind his time away from work and to report to work instead.

The claimant's final attendance infraction took place when he did not report for scheduled work on July 25, 2011, due to incarceration. The claimant was arrested for driving on a suspended license. Mr. Scott plans to enter a guilty plea on the charge.

**REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. 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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment benefits. The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa App. 1992).

The Iowa Supreme Court in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is a form of misconduct. The Court held that it must both be excessive and unexcused and that the concept includes tardiness, leaving early, etc. The Court further held that absence due to illness or other excusable reasons are deemed excused if the employee properly notifies the employer.

In this matter, Mr. Scott was discharged after he exceeded the permissible number of attendance infractions allowed under established company policy, and the claimant was aware of the policy. Mr. Scott did not provide proper notification for his absence on July 20, 2011. He failed to personally notify his supervisor as required. On July 25, the claimant did not report to work because he was incarcerated. The claimant at that time had another individual call in for him.

Absence due to incarceration is considered to be unexcused, as the claimant's own conduct caused him to be incarcerated and unable to attend work. The evidence in the record established that the claimant was arrested for driving on a suspended license and that the claimant plans to plead guilty to the offense.

Based upon the number absences during the claimant's short period of employment, the failure to provide required notice, and the reasons for the claimant's most recent absence, the administrative law judge concludes that the employer has sustained its burden of proof in showing the claimant's discharge took place under disqualifying conditions. Unemployment insurance benefits are withheld.

**DECISION:**

The representative's decision dated August 25, 2011, reference 01, is affirmed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he meets all other eligibility requirements of Iowa law.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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