

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JEREMY R SHADEL Claimant	APPEAL NO. 08A-UI-08158-S2T
CASEY'S MARKETING COMPANY Employer	ADMINISTRATIVE LAW JUDGE DECISION
	OC: 08/17/08 R: 01 Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Jeremy Shadel (claimant) appealed a representative's September 5, 2008 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Casey's Marketing Company (employer) for failure to follow the employer's instructions in the performance of his job. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 24, 2008. The claimant participated personally. The employer participated by Toni Richardson, Manager, and Ashley Thornton, Assistant Manager.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 18, 2005, as a part-time cashier/cook. The claimant signed for receipt of the employer's handbook on August 18, 2005. The handbook contains an attendance policy. The manager had a policy that stated that an employee must give notice of an absence 24 to 48 hours in advance of the absence. Employees were notified of the policy at a staff meeting on July 21, 2008. The claimant did not remember hearing the policy. The claimant was absent from work due to back problems, moving his household and issues regarding his son.

On August 10, 2008, the claimant told the assistant manager prior to the start of his shift that he was having back problems and could not work that day or the following day. The assistant manager called the claimant back and spoke to the claimant's girlfriend. The claimant was passed out from the medication. Later the assistant manager's brother told the assistant manager that he saw the claimant at a movie. The claimant did not attend the movie.

On August 13, 2008, the claimant appeared for work. The employer talked about the movie and issued the claimant a written warning for excessive absenteeism. The employer told the claimant he could not return to work until he presented her with a doctor's excuse for August 10

and 11, 2008. The claimant could not provide the note because the employer asked for the note after the date of the problem. The claimant's physician would not provide a note for a previous day. The employer would not allow the claimant to return to work.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of

absence was a properly reported illness which occurred on August 10 and 11, 2008. The claimant's absence does not amount to job misconduct because it was properly reported to the best of the claimant's ability. An employee cannot not always predict physical conditions 24 hours in advance. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

The claimant's and the employer's testimony is inconsistent with regard to the claimant's attendance at a movie. The administrative law judge finds the claimant's testimony to be more credible because he was an eye witnesses. The employer relied on information given to it by a person who did not testify under oath at the hearing.

DECISION:

The representative's September 5, 2008 decision (reference 01) is reversed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs