

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**HEATH G OMAR**  
Claimant

**APPEAL NO. 09A-UI-00414-S2**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CLIPPER WINDPOWER INC**  
Employer

**OC: 11/09/08**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct  
Section 96.4-3 – Able and Available

**STATEMENT OF THE CASE:**

Heath Omar (claimant) appealed a representative's January 2, 2009 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Clipper Windpower (employer) for repeated tardiness in reporting to work. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was scheduled for April 27, 2009. The claimant was represented by Joe Harris, Attorney at Law, and participated personally. The employer did not appear and, therefore, did not participate in the hearing. The claimant offered and Exhibit A was received into evidence.

**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 27, 2007, as a full-time hub assembler. The claimant worked the 3:30 to 11:00 p.m. shift. At the time he was hired the employer understood the claimant was a volunteer fireman and part of the Linn County hazmat team. The employer told the claimant he could answer emergency calls during work hours.

The employer issued the claimant a verbal warning on September 5, 2008, for using his personal cellular telephone while at work. On September 8, 2008, the claimant was sick and vomiting. Due to his illness, he slept through his shift and was unable to contact the employer. On September 9, 2008, the employer issued the claimant a written warning for his failure to properly notify the employer regarding his absence. The employer changed the claimant's work hours to 7:00 a.m. to 3:30 p.m. and said he could not take emergency calls during work hours. The employer told the claimant he could respond to calls outside of work hours that went in to work time. The claimant was supposed to notify the employer of his absence as soon as he safely could do so. The employer understood the claimant could not drive an emergency vehicle and talk to the employer on his cellular telephone to report his absence.

On November 3, 2008, the claimant responded to an emergency call. He reported his tardiness to the employer as soon as he could. The claimant arrived at work one hour late and worked the rest of the day. At the end of his shift the employer terminated the claimant. Later the employer laid off approximately 200 workers.

### **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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The employer did not participate in the hearing and, therefore, provided no evidence of job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

The administrative law judge concludes the claimant is able and available.

871 IAC 24.23(16) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

When an employee requests and is granted time off, he is considered to be unavailable for work. The claimant was able to work full-time hours and work as an emergency worker. The claimant is not considered to be unavailable for work. The claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:**

The representative's January 2, 2009, decision (reference 01) is reversed. The employer has not met its proof to establish job related misconduct. The claimant is able and available for work. Benefits are allowed.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs