

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT J MCCARTHY
Claimant

APPEAL NO. 15A-UI-01563-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

VON MAUR INC
Employer

OC: 01/11/15
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Von Maur, Inc. filed a timely appeal from a representative's decision dated January 30, 2015, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on March 4, 2015. Although duly notified, the claimant did not respond to the notice of hearing and did not participate. The employer participated by Ms. Kayla Seits, Distribution Center Manager. Employer's Exhibits A, B, C, and D were submitted into evidence.

ISSUE:

The 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: Robert McCarthy was employed by Von Maur, Inc. from May 10, 2010 until December 30, 2014 when he was discharged for exceeding the permissible number of attendance infractions under company policy. Mr. McCarthy worked as a full-time merchandise processor for the company and was paid by the hour. His immediate supervisor was Kayla Seits.

Mr. McCarthy was discharged on December 30, 2014 after he failed to report to work the preceding day, December 29, 2014. On that date Mr. McCarthy properly notified the employer in advance of his work shift that he was ill and could not report to work that day. The employer considered the claimant's statement that he was ill that day to be credible. However, because the claimant had been repeatedly warned in the past and his attendance in the past had not been good, a decision was made to terminate Mr. McCarthy from his employment.

During the course of his employment, Mr. McCarthy had been absent from work on numerous occasions attributing most of his absences to illness. The employer noted a pattern of Mr. McCarthy calling in in two-day increments. Although the employer had suspicions that

Mr. McCarthy was not ill on all of the occasions that he had called in in the past, the employer did not require medical documentation from the claimant.

Because Mr. McCarthy was otherwise a valued employee, the distribution center manager had given the claimant extra warnings about his attendance prior to making a decision to terminate Mr. McCarthy from his employment on December 30, 2014. The claimant received a second final warning for attendance on November 20, 2014 and was warned at that time that an additional attendance infraction would cause his discharge from employment. The claimant had not been absent from the date of the final warning until his most recent infraction that took place on December 29, 2014.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Since the claimant was discharged, 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 insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). 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 Ct. of Appeals 1992).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must first establish that the claimant's unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation or oversleeping are considered unexcused. Absences related to illness or injury are considered excused providing the employee has complied with the employer's policy regarding notification of the employer of the absence. Tardiness or leaving early are forms of absences. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes that Mr. McCarthy had been often absent during his employment with Von Maur, Inc. In most instances the claimant had properly reported his impending absence stating illness or injury as the reason for being absent from work. Although the employer had suspicions that Mr. McCarthy was not ill at times, the employer did not require further medical verification on that issue.

The final attendance infraction that caused the claimant's discharge took place on December 29, 2014 when Mr. McCarthy called off work stating that he was ill. The claimant properly reported his absence and the employer believed that the claimant's reason for being absent that day was credible. Because the claimant had properly reported his final absence due to illness, the absence was excused for the purposes of the Iowa Employment Security Law.

Based upon the evidence in the record and the application of the appropriate law, the administrative law judge concludes that the claimant's final absence which prompted his discharge was due to illness and was properly reported and does not constitute misconduct in connection with the claimant's work. Accordingly, the administrative law judge concludes the claimant was discharged under non disqualifying conditions and is eligible to receive unemployment insurance benefits providing that he meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated January 30, 2015, reference 01, is affirmed. Claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs