

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NICHOLAS ARMSTRONG

Claimant

APPEAL 19A-UI-08575-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

PACKERS SANITATION SERVICES INC

Employer

OC: 10/06/19

Claimant: Respondent (1)

Iowa Code § 96.5-2-a – Discharge for Misconduct

Iowa Code § 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Packers Sanitation Services (employer) appealed a representative's October 23, 2019, decision (reference 01) that concluded Nicholas Armstrong (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for November 22, 2019. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Marissa Rowen, Office Manager.

The employer offered and Exhibit One was received into evidence. The administrative law judge took official notice of the administrative file.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

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, for a second period of employment, on August 3, 2019, as a full-time sanitation worker. The employer has a handbook but the claimant may not have signed for receipt of it.

The handbook states, "If an employee obtains five or more excused absences in their introductory period, it is considered excessive and will be grounds for termination unless reasonable accommodations are appropriate under the ADAAA or if the employee is on Workers' Compensation leave. The Company will engage in the interactive process and consider reasonable accommodations for employees who may have a disability during the introductory period. Unexcused absences will follow the Company's normal progressive disciplinary process." Excused absences include absences due to illness with a doctor's note.

The handbook indicates that the employer will issue a written warning to an employee who has one unexcused absence, a written warning and a meeting with the site manager if there are two unexcused absences, and a three-day suspension for three unexcused absences. A worker

can be terminated after the fourth unexcused absence. The employer did not issue the claimant any warnings during his employment.

The claimant was absent on August 14, 15, 16, 17, 19, 20, September 9, 10, 11, 12, 26, and 27, 2019. He reported his absences but the employer did not provide the call in log to the office manager. The claimant gave the employer doctor's notes excusing him from work. One note excused him from work from September 26 to October 2, 2019, at least five working days. The claimant called the employer to report his absences due to a medical condition on September 26, 27, 30, October 1, 2, 3, and 4, 2019. On October 4, 2019, the employer terminated the claimant for more than five excused absences during his first ninety days of work.

The claimant filed for unemployment insurance benefits with an effective date of October 6, 2019. The employer participated personally at the fact finding interview on October 22, 2019, by Marissa Rowen.

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, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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(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.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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 absenteeism was reported medical condition which occurred from September 26, 2019, to October 4, 2019. The claimant's absence does not amount to job misconduct because it was properly reported. 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. Benefits are allowed, provided the claimant is otherwise eligible.

The employer's testimony was incomplete. The administrative law judge finds that its excuse that it was unable to provide doctor's notes, handbook receipts, and call in logs as evidence for various reasons is without merit. The employer was unwilling to furnish the necessary evidence and, therefore, misconduct cannot be established.

DECISION:

The representative's October 23, 2019, decision (reference 01) is affirmed. The employer has not met its proof to establish job related misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/scn