

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAVIER C HERNANDEZ
Claimant

APPEAL NO. 10A-UI-14071-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**ALL AROUND TOWN
OUTDOOR SERVICES LLC**
Employer

**OC: 11/22/09
Claimant: Appellant (1)**

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

An appeal was filed from an unemployment insurance decision dated October 7, 2010, reference 02, that concluded the claimant was disqualified. A telephone hearing was scheduled for November 29, 2010. The appellant did not participate in the hearing. The employer participated by President James Holt.

ISSUE:

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

FINDINGS OF FACT:

The parties were properly notified of the scheduled hearing on this appeal. The appellant provided a telephone number to the Appeals Section. That number was dialed at 9:59 a.m. and the only response was a voice mail. A message was left indicating the hearing would proceed without the appellant's participation unless he contacted the Appeals Section at the toll-free number prior to the close of the record. By the time the record was closed at 10:13 a.m., the appellant had not responded to the message and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice.

Javier Hernandez was employed by All Around Town from April 20, 2008 until September 13, 2010 as a full-time laborer. President James Holt had verbally warned him in the past he was not to be using the company truck for personal business and not to be going home or doing other personal business on company time.

On Friday, September 10, 2010, the claimant was working at a job site in Iowa. The supervisor released the workers to go back to the office, also in Iowa, when the job was done, and informed Mr. Holt. Shortly after that, the employer saw the claimant driving a company truck across the bridge from Iowa to Illinois. He called the supervisor to ascertain whether Mr. Hernandez had been sent to another site and was told he had been sent back to the office to punch out and pick up his check.

The employer returned to the office to check the GPS system and discovered the claimant's truck was in Rock Island, Illinois. Mr. Hernandez had also not punched out and was still on the clock. Around 5:30 p.m. the claimant responded to messages left on his cell phone by the employer. He said he had taken the truck from the job site to the office, picked up his paycheck and then drove the company truck to Illinois to cash the check. His personal vehicle was still at the office. Mr. Holt told him to return the company truck immediately, which he did.

On Monday, September 13, 2010, Mr. Holt discharged the claimant for misappropriation of the company truck and for conducting personal business on company time.

REASONING AND CONCLUSIONS OF LAW:

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 claimant had been advised his job was in jeopardy as a result of using company vehicles for personal business and also doing personal business while on the clock. The discharge was precipitated when the employer again discovered he was still on the clock and using a company vehicle to go to his personal bank to cash his paycheck. Mr. Hernandez had gone to the office, where he could have punched out, taken his paycheck, and driven his personal vehicle to his bank. This is misuse of company property and theft of company time, as he was being paid while running personal errands. This is a violation of the duties and responsibilities the employer has the right to expect of an employee and conduct not in the best interests of the employer. The claimant is disqualified.

DECISION:

The unemployment insurance decision dated October 7, 2010, reference 02, is affirmed. The decision disqualifying the claimant from receiving benefits remains in effect. This decision will become final unless a written request establishing good cause to reopen the record is made to the administrative law judge within 15 days of the date of this decision.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw