

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

SON TONG  
1344 - 21<sup>ST</sup>  
DES MOINES IA 50311

EMCO ENTERPRISES INC  
c/o EMPLOYERS UNITY INC  
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ARVADA CO 80006-9000

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DES MOINES IA 50314-2527

Appeal Number: 05A-UI-02808-SWT  
OC: 01/23/05 R: 02  
Claimant: Respondent (1)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated March 8, 2005, reference 04, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on April 11, 2005. The parties were properly notified about the hearing. The claimant participated in the hearing with his representative, Laura Lockard, attorney at law. Phung Nguyen acted as an interpreter for the claimant. Lucie Hengen participated in the hearing on behalf of the employer with a witness, Randy Ross. Exhibits A and B were admitted into evidence at the hearing.

FINDINGS OF FACT:

The claimant worked full time for the employer as a production worker from April 23, 1992 to December 28, 2004. He was informed and understood that under the employer's work rules,

he was required to receive permission to be off work and could be terminated after three days of absence without notice to the employer. Bill Probasco was the claimant's supervisor.

On December 15, 2004, the claimant approached Probasco about taking a leave of absence to go to Vietnam for medical treatment. Probasco told the claimant that he would have to complete a leave of absence form and have it approved to take the time off. Probasco filled out a leave of absence for the claimant indicating that he was requesting leave from January 3, 2005 to January 24, 2005, to receive medical treatment in Vietnam. The bottom of the form contains lines for signatures from the supervisor, plant manager, human resources department, union steward, and the employee. The claimant and union steward signed the form. Probasco signed the form and checked the column labeled, "Approved." The claimant was told that he would need to send in additional information to verify the need for the leave of absence and was given a fax number to submit information. The claimant understood that the leave was approved but that he needed to fax in documentation to verify his leave when he got to Vietnam. He did not understand that the information needed to be submitted before he left. He did not understand that the plant manager and the human resources department had to sign the form in order for the leave to be approved. The claimant's primary language is Vietnamese, and his English language skills are weak. No interpreter was used in the claimant's discussions with Probasco.

After December 28, 2004, the claimant's next scheduled day of work was January 3, 2005. The employer considered the claimant to be absence without leave or notice to the employer on January 3, 4, and 5, 2005. The claimant traveled to Vietnam and was evaluated by a doctor on January 3, 2005. He immediately faxed medical documentation to the employer verifying the fact that he had been examined by his doctor.

The claimant returned to work on January 24, 2005, and after an investigation, he was terminated on January 26, 2005, for being absent without approval.

#### REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. The employer contended that the claimant knew when he left that his leave was not approved and told the employer this in a meeting. Ross, however, admitted that there were language barriers in communicating with the claimant. I believe the claimant may have said that he now knew that he did not have his leave approved, but I believe the claimant's testimony that when he left he believed the leave had been granted.

The claimant did not commit any work-connected misconduct when he left work with the understanding that his leave had been approved.

DECISION:

The unemployment insurance decision dated March 8, 2005, reference 04, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

saw/sc