

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN FIRNHABER
Claimant

APPEAL NO: 14A-UI-11035-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA STATE UNIVERSITY
Employer

OC: 09/21/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 13, 2014, reference 02, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 13, 2014. The claimant did not respond to the hearing notice by providing a phone number where he could be reached at the date and time of the hearing as evidenced by the absence of his name and phone number on the Clear2There screen showing whether the parties have called in for the hearing as instructed by the hearing notice. The claimant did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Tasha Barton, Human Resources Consultant; Teri Sieve, Manager of Custodial Services for Facilities Planning and Management; and Brad Gulbranson, Custodial Facilitator for Facilities Planning and Management; participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time custodian I for Iowa State University from November 8, 2010 to September 11, 2014. He was discharged for failing to follow the employer's call in policy and failing to report to work after being released to return to work.

On Wednesday, July 30, 2014, the claimant sustained a work-related injury and his supervisor, Brad Gulbranson directed him to see the employer's worker's compensation physician at 10:30 a.m. Mr. Gulbranson told the claimant to return with his paperwork that day and emphasized there would be personnel present until 4:00 p.m. to accept his medical documentation. The doctor released the claimant to return to work later that day but he did not go back to work that day or call the employer or report for work Thursday, July 31, 2014. On Friday, August 1, 2014, the claimant returned to work at 4:00 a.m. but did not tell the employer he had been placed on restrictions or provide it with the paperwork from the physician. At 8:00 a.m. the claimant went to the office and presented his paperwork. He then requested

same day sick leave and asked Facilitator Jane Abell if he could go home. Ms. Abell was not the claimant's direct supervisor but gave him permission to leave. She told him to report to supervisor Brad Gulbranson's office in the General Services Building Monday, August 4, 2014, to go over his work restrictions and a work plan.

On Monday, August 4, 2014, the claimant returned to work without reporting to Mr. Gulbranson's office and Mr. Gulbranson then had to page him to come to his office. The claimant denied that Ms. Abell instructed him to report to Mr. Gulbranson before returning to work Monday, August 4, 2014. Mr. Gulbranson proceeded to review the claimant's work plan and restrictions with him and the claimant was assigned to work light duty in Sweeney Hall, a different location from where he usually worked. The claimant stated he did not want to do the work assigned and then asked to leave at 8:00 a.m. to go to his doctor to discuss his work restrictions which included no ladders or elevated work, no lifting, pushing, pulling or repeated lifting over ten pounds, no repeated bending or twisting of his low back, and no deep squatting or kneeling. On Tuesday, August 5, 2014, at 4:00 a.m. the claimant returned to work and gave Mr. Gulbranson new paperwork lifting all his restrictions and stating he could return to work as usual. The employer began an investigation into the claimant's no-call no-show July 31, 2014, and failure to follow Ms. Abell's instructions to report to the General Services Building August 4, 2014. It determined the no-call no-show absence was unwarranted and because the claimant was on the last of the employer's progressive disciplinary policy steps his employment was terminated September 11, 2014.

The claimant received a verbal warning September 20, 2013, after he failed to notify the employer he would be 15 minutes tardy. He was placed on paid administrative leave April 9 through April 28, 2014, after teammates alleged inappropriate behavior on the part of the claimant. His co-workers reported he was hostile, refused to cooperate with them, threw objects at them, threatened to throw a co-worker out of a car and raised his voice to them. Two teammates stated they were afraid of him and that the conduct had been ongoing for several months. After the employer's investigation the claimant was suspended for one day but that was changed to a three day suspension because the claimant contacted another team member after being instructed not to do so and the employer considered his actions retaliatory in nature. On June 3, 2014, he was suspended for five days due to a failure to meet the employer's expectations of his position such as communication, team work, maintenance of his area, unauthorized breaks, not being responsive to Mr. Gulbranson when needed to help with maintenance clean up, and being gone for long periods of time.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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(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.

The employer has the burden of proving disqualifying misconduct. 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 claimant's actions rise to the level of disqualifying job misconduct. He was on the last step of the employer's disciplinary action policy after previous incidents demonstrating a poor attitude and bad behavior toward co-workers and management throughout the last year. The final incident involved the claimant failing to follow specific instructions to return with his medical paperwork July 30, 2014; a no-call no-show July 31, 2014; and failure to provide his medical restrictions to the employer before returning to work August 1, 2014. The claimant had been warned about tardiness, received a three-day suspension for creating a hostile work environment for his co-workers and then acting in a retaliatory manner toward one of his teammates, and failing to meet the employer's expectations. The claimant knew or should have known his job was in jeopardy prior to the events beginning July 30, 2014.

That said, the final incidents leading to the claimant's termination occurred July 30 through August 4, 2014. The employer, however, did not discharge the claimant until September 11, 2014. It went through the administrative disciplinary processes but waited six weeks, during

which time the claimant continued to work, before terminating the claimant's employment. A termination for misconduct cannot be based on past acts of misconduct. In this case the employer waited so long before taking action to terminate the claimant's employment, his actions July 30 through August 4, 2014, were no longer current acts of misconduct. Consequently, the administrative law judge must conclude that while the claimant's behavior was misconduct, the employer did not act in a timely manner to terminate his employment and as a result the claimant's actions cannot be considered current acts of misconduct. Therefore, benefits must be allowed.

DECISION:

The October 13, 2014, reference 02, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs