

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

JAMES D EVANS
5520 MEREDITH DR APT 7
DES MOINES IA 50310

MOBILE POWER WASH INC
CAREY CLEAN SYSTEMS
1427 BUFFALO RD
WEST DES MOINES IA 50265-1627

Appeal Number: 05A-UI-05166-SW
OC: 04/17/05 R: 02
Claimant: Appellant (2)

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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated May 6, 2005, reference 01, that concluded he was discharged for work-connected misconduct. A hearing was held on June 9, 2005, in Des Moines, Iowa. The parties were properly notified about the hearing. The claimant participated in the hearing with a witness, Jonnette Wisecup. Rob Carey participated in the hearing on behalf of the employer. Exhibits One through Five and A through F were admitted into evidence at the hearing.

FINDINGS OF FACT:

The claimant worked for the employer as a power wash worker from July 1, 2004, to April 19, 2005. The claimant was informed and understood that under the employer's work rules, employees were required to notify the employer if they were not able to work as scheduled. Rob Carey was the claimant's supervisor.

The claimant received a verbal warning about his attendance on December 28, 2004, about missing work on December 23, 2005. The claimant had requested and received approval to take December 23 through 25 off work to spend time with his younger brother who was visiting over the Christmas holidays.

The claimant received a written warning for reporting to work at 12:40 p.m. on April 12, 2005. He had been told that there was only a Federal Express account to do that day, which was scheduled at 3:00 p.m. The claimant was not on any schedule to work at 8:00 a.m. but had work that he could have been doing earlier in the day on a piece-rate basis.

On April 14, 2005, the claimant requested and received approval to take April 18 and 20, 2005, off work. The claimant's daughter was scheduled for surgery for a serious health condition on April 18. On April 20, the claimant's girlfriend was subpoenaed for depositions in the afternoon when the claimant was scheduled to work at 4:00 p.m. It was medically necessary for the claimant to stay with their daughter.

On April 19, the claimant was late for work. He had been at the hospital with his daughter the entire day of April 18 and overnight. He got very little sleep in the hospital because he was required to stay with his daughter after the surgery.

On April 15, Carey asked the claimant if it was possible for him to work on April 20. The claimant said it was possible if his girlfriend returned from her deposition in time. The claimant called Carey at 2:30 p.m. and informed him that his girlfriend was not home yet and he did not know when she would be back. He called at 4:00 p.m. and told Carey that his girlfriend had not shown up yet and he did not think he would be able to work. Carey told the claimant to let him know when his girlfriend got home and come in as soon as he could. The deposition did not get over until later that evening. The claimant's girlfriend did not get back home until 8:00 p.m., which was after his shift would have ended. The claimant did not call Carey back.

When the claimant reported to work on April 21, 2005, Carey discharged him for failing to work on April 20 and failing to respond to messages that Carey had left inquiring about his work status.

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, (8) provide:

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).

(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 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).

While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. In regard to the final incident, the claimant had requested to be off work on April 20, due to a legitimate family medical emergency. The claimant agreed to work if his girlfriend got back from her depositions on time. She did not get home until after the claimant's scheduled work shift would have ended. He, therefore, missed work for legitimate reasons. When the claimant called Carey at 4:00 p.m., Carey knew at that point that the claimant was not going to be able to come to work at his scheduled time and that Carey could not count on him to work that evening. The claimant may have been at fault in not calling Carey later that evening, but the failure to call was not due to willful and substantial misconduct.

DECISION:

The unemployment insurance decision dated May 6, 2005, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

saw/tjc