

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL A WATT
Claimant

APPEAL NO: 13A-UI-14251-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BORDER STATES CONTRACT SERVICE
Employer

OC: 10/27/13

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Michael A. Watt (claimant) appealed a representative's December 23, 2013 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Border States Contract Service, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 22, 2014. The claimant participated in the hearing. A review of the Appeals Section's conference call system indicates that the employer failed to respond to the hearing notice and provide a telephone number at which a witness or representative could be reached for the hearing and did not participate in the hearing. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on or about March 1, 2013. He worked full time as a rest area cleaner at highway rest stops near Cedar Rapids and Tiffin, Iowa. He worked a Friday, Saturday, Sunday, Monday schedule. He had two separations from employment. His initial last day of work was on or about Monday, October 28, 2013. He was then scheduled to work on Friday, November 1; however the claimant advised the employer through a text message that he was going to be absent that day because his nephew was in the hospital in an emergency situation. The employer responded by informing the claimant by text message that he was discharged for his absence. The claimant had only missed two other days of work, one due to personal illness, and the other because of having a dispute with a coworker. The claimant had not been informed that his job was in any jeopardy due to his prior absences.

On or about November 15 the employer and the claimant spoke and the employer agreed that the claimant should be returned to work; he worked approximately one day that week and approximate one day the week ending November 23. The claimant had gotten his initial final paycheck from the employer on November 4 for the pay period which ended on October 30; however, the employer had deducted the entire amount of a loan which the employer had previously made to the claimant from the wages on that paycheck. The claimant filed a complaint with the labor board because he had not authorized this deduction from his check. Prior to November 23 the employer asked the claimant to withdraw his complaint from the labor board, but the claimant declined. As a result, the employer did not schedule the claimant for any further work after November 23.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant on or about November 1 was his attendance. Excessive unexcused absences can constitute misconduct, however, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of his job. *Cosper*, supra; *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). The claimant had not previously been warned that future absences could result in termination. *Higgins*, supra. Nor has it been established that the claimant's final absence was unexcused or that he had excessive prior unexcused absences. As to his second separation on or about November 23, the employer effectively discharged the claimant because of his refusal to withdraw his complaint regarding the unauthorized withholding from his paycheck. This is not misconduct. The employer has not met its burden to show disqualifying misconduct for either separation. *Cosper*, supra. Based

upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's December 23, 2013 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css