

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAM C COLVIN
Claimant

APPEAL NO. 12A-UI-04675-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MASHEK BROTHERS LLP
Employer

OC: 02/26/12
Claimant: Appellant (2)

Section 96.5(2)a - Discharge

STATEMENT OF THE CASE:

The claimant, William Colvin, filed an appeal from a decision dated April 10, 2012, reference 01. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on May 15, 2012. The claimant participated on his own behalf and with Mary Pat Sill. The employer, Mashek Brothers, participated by Manager Wayne Mashek, Assistant Managers Kelly Mashek and Rita Brunner, and Cook Gilbert Lopez.

ISSUE:

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

FINDINGS OF FACT:

William Colvin was employed by Mashek Brothers from April 6, 2011 until March 3, 2012 as a full-time cook. During the course of his employment, he received numerous verbal and written warnings about absenteeism, tardiness, poor performance, insubordination, and other matters. He was aware his job was in jeopardy.

On Friday, March 2, 2012, he called in absent due to illness. On March 3, 2012, he was ten minutes late to work because his father had called just before he was leaving to inform him his grandfather had died. The claimant called the employer as soon as he got off the phone and said he would be right in. He arrived at 9:10 a.m. for a 9:00 a.m. shift and was discharged.

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 record establishes the claimant was not the most desirable of employees given his history of tardiness and other problems. But, the issue is whether there was a final incident of misconduct that precipitated the decision to discharge as required by 871 IAC 24.32(8). The final incidents were an absence due to a properly reported illness, which is not misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The second incident was being ten minutes late to work after the claimant received a call to inform him his grandfather had died. The administrative law judge does not consider it to be unreasonable for Mr. Colvin to have lingered on the phone to talk to his father about this and he did call as soon as possible to inform the employer he would be late.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper (supra)*. The issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits.

There was no final incident of misconduct and disqualification may not be imposed.

DECISION:

The representative's decision of April 10, 2012, reference 01, is reversed. William Colvin is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw