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

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Appeal Number: 04A-UI-01306-H2T
OC 01-04-04 R 04
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, 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/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 29, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 27, 2004. The claimant did participate. The employer did participate through Barbara McCleary, Employee Services Specialist; Doug Gaumer; Supervisor of Water Distribution and Production; and Tom Robertson; Director of Employee Services; Eric Cox; and Ray Danz. Employer's Exhibit One was received. Claimant's Exhibit's A through F were received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a water distribution operator full time beginning October 21, 1985 through January 5, 2004 when he was discharged. He was suspended beginning on December 17, 2003 while an investigation was conducted as to why the claimant had not shown up to work for five consecutive days beginning on December 8, 2003 through December 15, 2003. The claimant was a no-call/no-show to work beginning on December 8, 2003. At a meeting held on December 15, 2003 the claimant told Mr. Robertson that he had flown to California to be with his father who had previously had a heart attack. When the claimant was asked to verify his trip to California the claimant provided a rental contract with Hertz Rent-a-Car. Mr. Robertson checked the miles driven by contacting Hertz and was told that the rental car had been driven just over 3,000 miles. The claimant could not have driven to California and back driving only 3,000 miles. When the claimant was confronted with this information, he then indicated that he had not been in California, but had in fact gone to Austin, Texas to explore suitable nursing homes in which to place his father.

The claimant had previously indicated in an e-mail that he would be taking family medical leave in October, November and December. The employer approved the time periods for leave and the claimant did take leave in October 2003. The claimant cancelled his family leave for November when other family members were able to cover for him. The claimant confirmed this by e-mail to the employer. The claimant never sent an e-mail canceling his family leave scheduled for December. The claimant denies ever telling Mr. Gaumer, (his direct supervisor) or Barbara McCleary that he would not be using his family medical leave in December. The employer alleges that before leaving on family leave in December that the claimant should have sought approval of his supervisor to be gone. This is was not the policy that the claimant followed when he was gone on family medical leave in October. After the claimant had been approved for family medical leave in October, he was required to do nothing more to obtain permission from his supervisor in order to be gone.

The claimant penciled himself out on a calendar kept in the back room during the week in December when he was gone.

When the claimant returned to work he was involved in a meeting on December 15, 2003 with, among others, Tom Robertson. At that meeting the claimant lied about where he had been during his weeklong absence. The claimant indicated to Mr. Robertson and to Mr. Gaumer that he had flown to California to be with his father. When the claimant admitted that he had been in Texas, he provided Mr. Robertson with brochures of assisted living facilities he allegedly visited while in Texas. Mr. Robertson contacted those facilities and they told him there was no record of the claimant visiting those facilities to inquire about placing his father in one of them. The claimant submitted letters from a number of facilities indicating that he had visited their locations in December 2003 while he was in Texas.

Based on the employer's conclusion that the claimant was unable to provide any corroborating information that he had actually been in Texas during the week in December and its conclusion that the claimant had lied during an investigation, and that the claimant had abandoned his job by being a no-call/no-show for five consecutive days, the claimant was discharged.

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 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 of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer discharged the claimant and has the burden of proof to show misconduct. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

The employer has not established that the claimant ever cancelled his family medical leave for December. In light of the fact that the claimant was required to obtain no additional approvals after being granted leave for October, the employer has not established what other steps the claimant should have gone through before leaving for a previously approved leave in December. The employer's written policy does not outline the steps the claimant was required to perform once his initial request for family medical leave had been approved.

The claimant did lie to both Mr. Gaumer and to Mr. Robertson during the December 15, 2003 meeting about his whereabouts the previous week. Although improper, the conduct does not rise to the level of disqualification by standards of either frequency or severity. The claimant established through letters from facilities in Texas that he did actually visit those facilities during the week he was off on family medical leave. The claimant believed he had permission to be away from work that week in December when he was gone. The employer believed the claimant had cancelled his family medical leave. The miscommunication among the parties is not misconduct sufficient to disqualify the claimant from receiving unemployment insurance benefits. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The January 29, 2004, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/b