IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

VINCENT D ANKTON
Claimant

AEROTEK INC
Employer

APPEAL NO: 12A-UI-10957-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/15/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Vincent D. Ankton (claimant) appealed a representative's September 7, 2012 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Aerotek, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 4, 2012. The claimant participated in the hearing. Patrick Stellman appeared on the employer's behalf. One other witness, Alexandra Cannistra, was available on behalf of the employer but did not testify. Based on the evidence, the arguments of the parties, a review of the law, and assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, 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 employer is a temporary employment and staffing firm. The claimant began taking assignments with the employer in early October 2011. His second and, to date, final assignment began on January 3, 2012. He worked full-time as a credit card services customer service representative at the employer's Des Moines, Iowa area business client. His last day on the assignment was July 16, 2012. The assignment ended because the business client determined to discharge him from the assignment. The reason asserted for the discharge was that the claimant had gone to the breakroom to get a soda while there were customers on hold in the phone queue.

The claimant denied that he had gone to the breakroom to get a soda. He acknowledged that he had been away from his desk for about four minutes after completing a long call because he

needed to use the restroom, which was on the other side of the breakroom. As he returned from the restroom and was passing by the breakroom, the client's onsite manager saw the claimant and inquired why he was away from his desk. The onsite manager then determined that the claimant's assignment should be ended, and reported to the employer's recruiter, Stellman, that he had seen the claimant getting a soda in the breakroom. As a result, the claimant's assignment was ended.

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 that 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 that 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 from the assignment is that he went to the breakroom and got a soda when he should have been at his desk taking calls. However, the claimant denied going to the breakroom and getting a soda, but testified that he only made a quick but necessary trip to the restroom. No witness was available at the hearing to provide testimony to the contrary under oath and subject to cross-examination. The employer relies exclusively on the second-hand account from the business client's onsite supervisor; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the onsite supervisor might have been mistaken, whether he actually observed where the claimant had been, whether he is credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of the onsite supervisor's report. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant had gone to the breakroom and got a soda, as compared to making a trip to the restroom. The

employer has not met its burden to show disqualifying misconduct. *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 September 7, 2012 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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