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

WILLIE D GEORGE
409 W NEVADA
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JELD-WEN INC
C/O TALX UCM SERVICES INC
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ST LOUIS MO 63166-0283

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Appeal Number: 05A-UI-03931-RT
OC: 03-27-05 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 for Misconduct

STATEMENT OF THE CASE:

The claimant, Willie D. George, filed a timely appeal from an unemployment insurance decision dated April 12, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on May 3, 2005, with the claimant participating. The claimant was represented by Richard Schmidt, Attorney at Law. Brad Harris, Production Manager and John Murphy, Group Manager, participated in the hearing for the employer, Jeld-Wen, Inc. The employer was represented by Judi Gentry of TALX UCM Services, Inc.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time laborer from August 12, 2002 until he was discharged on March 28, 2005. The claimant was discharged for being out of his work area during work time. On March 28, 2005, the claimant was observed talking to a co-worker out of the claimant's work area for between one and two minutes when he was not on a break or lunch period. That day the claimant was assigned outside but he was observed inside. As a result of this incident, the claimant was discharged. The claimant had been assigned outside and had been working outside but he had to go to the bathroom so he came inside to go to the bathroom and used the direct route to get to the bathroom. Because the claimant has sensitive fingers, he went downstairs to the area where he could get some bandages for his fingers. This area is approximately ten feet from the area where the employee works with whom the claimant spoke. The claimant spoke for about one minute. The claimant was then summoned to the office of his direct supervisor, John Murphy, Group Manager, as was the other employee. He was admonished for being out of his work area and the claimant admitted that he was out of his work area and mentioned something about putting bandages on his fingers. The claimant did not display the bandages or explain the bandages. The claimant was then summoned to the office of Brad Harris, Production Manager, and admitted that he was away from his work area but stated something to the effect that he had been to the bathroom. Mr. Harris dismissed the claimant at that time and then called the claimant back later and discharged the claimant. The other employee with whom the claimant spoke was not disciplined because that employee remained in the employee's work area. There was no other reason for the claimant's discharge.

On August 2, 2004, the claimant received a verbal warning with a written record for smoking on a break in a doorway when he was not in his work area. The claimant was supposed to be outside but he was in the doorway of his area. On February 7, 2005, the claimant was given a written warning for smoking outside and away from his work area when he was supposed to be inside. The claimant had been working inside in the warehouse using a cleaning solvent. The cleaning solvent made him dizzy. The claimant was told to go outside if he got dizzy from the cleaning solvent. The claimant did so and was smoking when he got his written warning.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was not.

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 parties agree, and the administrative law judge concludes, that the claimant was discharged on March 28, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witnesses testified that the claimant was away from his work area for between one and two minutes talking to a co-worker. The claimant's work area on that occasion was outside. The claimant conceded that he was away from his work area but credibly testified that he had come inside to go to the bathroom and then went downstairs to get some bandages for his sensitive fingers. The bandages are located only about ten feet from the employee with whom the claimant was seen talking. This is even confirmed by one of the employer's witnesses. The claimant only talked for a minute or two and then was summoned to the office of his supervisor, John Murphy, Group Manager and one of the employer's witnesses. At that time the claimant admitted being away from his work area but said something to the effect about putting on bandages. The claimant did not demonstrate his bandages or explain his bandages. The claimant was then summoned to the office of Brad Harris, Production Manager, who also admonished the claimant for being out of his work area. The claimant admitted again that he had been away from his work area but said something to the effect that he had been to the bathroom. In any event the claimant was called back and discharged. The testimony of both Mr. Harris and Mr. Murphy is hearsay evidence but does not conflict with the claimant's testimony. The claimant seems to concede that he was away from his work area but has a justifiable reason inasmuch as he was going to the bathroom and then to get bandages and the bandages were located very near the employee with whom the claimant spoke. Mr. Murphy conceded that employees are allowed to use the bathroom whenever necessary.

The administrative law judge concludes under the evidence here that the claimant was justified in being away from his work area and the amount of time he spent talking to the co-worker was minimal. The administrative law judge notes that the co-worker was not in any way disciplined because the co-worker was not away from the co-worker's area. The claimant did receive a verbal warning on August 2, 2004 for smoking while not on a break in a doorway when he was not in his work area which was to be outside. The claimant also received a written warning on February 7, 2005 for smoking while outside when he was not in his work area which was the warehouse. The claimant credibly testified in regard to this warning that he was inside in his work area cleaning with a cleaning solvent that made him dizzy. The claimant credibly testified that he was told that if he got dizzy, to go outside. The claimant did so because he was dizzy. The claimant was smoking outside and was given a written warning. Under the evidence here, the administrative law judge is constrained to conclude that the claimant's acts on March 28, 2005, were not deliberate acts or omissions constituting a material breach of his duties and obligations arising out of his workers' contract of employment nor do they evince a willful or wanton disregard of an employer's interests nor are they carelessness or negligence to such a degree of recurrence so as to establish disqualifying misconduct. At the most, the claimant's behavior was mere inefficiency, unsatisfactory conduct, ordinary negligence in an isolated instance, or a good faith error in judgment or discretion and is not disqualifying misconduct. The administrative law judge notes that the claimant did receive two warnings but had an explanation for at least one of those warnings, the most recent one, on February 7, 2005. The other warning was on August 2, 2004, almost eight months before the claimant's discharge. Accordingly, the administrative law judge that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

DECISION:

The representative's decision of April 12, 2005, reference 01, is reversed. The claimant, Willie D. George, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct.

pjs/sc