

Iowa Code Section 96.5(2)(a) (2011) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects 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 to prove the Claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Moreover, "[a]llegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the Employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established." 871 IAC 24.32(4). Here all we have from the Employer is that the Claimant was fired for "improper conduct." (Fact Finding Worksheet). Obviously "improper conduct" is just a synonym for "misconduct," and thus this is simply a conclusory allegation of misconduct. The Employer representative admitted "that's all we have," was given additional time to produce more information, but to date the Employer has failed to produce any additional information. (Fact Finding Worksheet). This simply is not enough to carry a burden of proof, and the case falls exactly under rule 24.32(4) since all we have is an uncorroborated *allegation* of misconduct with no evidence in support of it, or even a description of what it was. The Employer has failed to prove misconduct. *C.f. Kelly v. Iowa Dept. of Job Service*, 386 N.W.2d 552, 555 (Iowa App. 1986)("The Employer's subjective judgment is proof of dissatisfaction but, without more, is not proof of misconduct.").

We recognize that the Employer won below and so did not have reason to argue to the Board why it did not appear, and to seek a remand. Such arguments may be raised in an application for rehearing if appropriate.

DECISION:

The administrative law judge's decision dated September 13, 2012 is **REVERSED**. The Employment Appeal Board concludes that the Employer has failed to prove that the Claimant was separated from employment in a manner that would disqualify the Claimant from benefits. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

John A. Peno

Cloyd (Robby) Robinson

DISSENTING OPINION OF MONIQUE KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Monique F. Kuester

RRA/fnv