

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JIM A WELBORN**

Claimant

**APPEAL NO: 06A-UI-08802-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KAUFMAN CONSTRUCTION INC**

Employer

**OC: 08/06/06 R: 02  
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Kaufman Construction, Inc. (employer) appealed a representative's August 24, 2006 decision (reference 01) that concluded Jim A. Welborn (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 19, 2006. The claimant participated in the hearing. Scott Spetman appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, 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?

**FINDINGS OF FACT:**

The claimant started working for the employer on November 7, 2004. He worked full time as a carpenter in the employer's residential construction and remodeling business. His last day of work was August 4, 2006. The employer discharged him on that date. The reason asserted for the discharge was making negative remarks about the business and management and not working efficiently after prior warning.

On July 28 the claimant and the employer met to review some performance issues regarding the claimant's then-position of lead carpenter. At the end of the discussion, the production manager, a Mark Black, told the claimant that he could continue employment as a carpenter but not a lead carpenter; Mr. Black had the claimant turn in his company cell phone and keys, as he would not be entitled to carry them as a non-lead carpenter, and told the claimant to think about what he wanted to do and report for work Monday, July 31 if he agreed to continue working as a regular carpenter.

The claimant decided he would continue his employment as a regular carpenter, but on July 31 he was sick; he did not have Mr. Black's cell phone number to call him directly as he had stored that number on the cell phone Mr. Black had taken from him on July 28, so he called and left a message on Mr. Black's office phone, even though the message on the voice mail advised that

it was not regularly checked for messages. That evening the claimant called another employee and obtained Mr. Black's cell phone number; on August 1 he called Mr. Black's cell phone to report that he was still sick but would be back to work the next day.

On August 2 the claimant met with Mr. Black and agreed to abide by certain terms in continuing his employment. Some of the terms were that the claimant was to demonstrate efficiency while working and to exhibit a positive attitude; he was not to make negative remarks regarding the employer's business, personnel, or management. He then reported to work at a remodeling project where there was only one other employee working. That employee allegedly reported to Mr. Black on both August 3 and August 4 that the claimant was not working very hard and was providing no assistance on the project and that he had been making negative remarks about the company. As a result, on August 4 Mr. Black discharged the claimant. The claimant denied he made any negative remarks about the company or anyone, and asserted that he had very little conversation at all with the other employee, as he was working on a downstairs level and the other employee was working upstairs. He further countered that he had in fact been working hard and steadily, having taken care of the work in several rooms downstairs while the employee working upstairs had only completed one room.

Mr. Spetman is the employer's general manager. Mr. Black informed Mr. Spetman of what he had been told and the action he took. However, Mr. Spetman did not visit the work site to see what work the claimant had completed or speak to the other employee himself.

#### **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).

Iowa Code § 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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
  - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
  - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
  - a. Manifest equal culpability, wrongful intent or evil design; or
  - b. Show an intentional and substantial disregard of:
    1. The employer's interest, or
    2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is the allegation that the claimant had made negative remarks and had failed to work efficiently after being warnings. The employer relies exclusively on at least second-hand account from Mr. Black and the other employee; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether Mr. Black might have been mistaken, whether Mr. Black actually observed either alleged infraction, whether either Mr. Black or the other employee or allegedly made the report to Mr. Black is credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of Mr. Black's report. 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 August 24, 2006 decision (reference 01) is affirmed. 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

ld/pjs