

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSTIN J PLOOG

Claimant

APPEAL NO. 10A-UI-04065-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

CUSTOM-PAK INC

Employer

OC: 11/15/09

Claimant: Appellant (1)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated March 9, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on April 8, 2010, in Davenport, Iowa. Claimant participated. The claimant was represented by Steve Stickle, attorney at law. Employer participated by Mitch Gravert, manufacturing manager; Ron Zimmer, vice president and general manager—DeWitt; Robert King, operator; and Darla Hoerner, operator. The record consists of the testimony of Mitch Gravert; the testimony of Ron Zimmer; the testimony of Darla Hoerner; the testimony of Robert King; the testimony of Justin Ploog; Claimant's Exhibits A; and Employer's Exhibits 1-8.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a manufacturing facility in DeWitt, Iowa, that does blow molding. The claimant was hired on August 29, 2005, as a full time member of the production team. His last day of work was February 12, 2010. He was placed on unpaid leave on that day and following an investigation, was terminated on February 16, 2010.

The incident that led to the claimant's termination occurred on February 12, 2010. The claimant worked the third shift, which ran from 11:00 p.m. to 7:00 a.m. The employer also had mandatory overtime and the claimant was required to work mandatory overtime from 7:00 a.m. to 11:00 a.m. His shift, therefore, was extended four additional hours. An employee was given the option of finding someone else to work his or her mandatory overtime.

The claimant did not want to work his mandatory overtime and approached another employee on third shift, Robert King, on whether Mr. King would like to work his overtime. Mr. King said

“How much?” It was common practice for an employee to offer cash to a worker to take the overtime. Mr. Ploog replied, “Ten dollars and some Vicodin.” Mr. King declined the offer. This conversation was partially overheard by another employee named Darla Hoerner. She was upset that Mr. Ploog would offer drugs in exchange for someone doing his mandatory overtime. She reported what she heard to Vicki Rixen, who was the human resources representative. The matter was then investigated by the employer. Statements were taken from Ms. Hoerner; Mr. King; and the claimant. Other managers were interviewed and the entire case was discussed with the vice president of human resources. The decision was made to terminate the claimant.

The termination was based on written company policy set forth in the employee handbook. The policy states that the illegal use, sale or possession of narcotics, drugs or controlled substances while on the job, on Custom-Pak property or at anytime engaged in Custom-Pak business will not be tolerated and will result in termination. (Exhibit 7). The claimant received a copy of that handbook on March 26, 2008.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. An employer has an interest in maintaining a drug free

workplace and can reasonably expect that rules which prohibit the illegal use or sale of controlled substances at the workplace will be followed by all employees.

In this case, the greater weight of the evidence established that the claimant did offer another employee some Vicodin so that employee would work the claimant's mandatory overtime. The claimant denied that he did so and speculated that he was targeted unfairly so that management would have an excuse to terminate him. There is no evidence to support the claimant's theory. A critical piece of evidence in this case is that it was not Mr. King who reported the incident to human resources, but another employee who overheard what the claimant said in part to Mr. King. She did not normally work with the claimant and had no issues with him that might cause her testimony to be suspect. Her testimony and Mr. King's testimony on what occurred are consistent.

The employer had the burden of proof to show misconduct. The incident on February 12, 2010, was a violation of the employer's written policy concerning drugs in the work place. The claimant materially breached his duty to the employer by offering prescription drugs to another worker. Benefits are denied.

DECISION:

The decision of the representative dated March 9, 2010, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs