

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHAWN M PETTIT

Claimant

APPEAL NO. 11A-EUCU-00641-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CULVER CONSTRUCTION INC

Employer

OC: 07/25/10

Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated August 1, 2011, reference 03, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 30, 2011. The claimant participated. The employer participated by Mark Culver, owner. The record consists of the testimony of Mark Culver and the testimony of Shawn Pettit.

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 remodeling company. The claimant was hired on April 14, 2011, as a shingler. He was a full-time employee. The claimant's last day of work was July 11, 2011. The claimant was terminated on July 11, 2011.

No one incident led to the decision to terminate the claimant. The employer was dissatisfied with the claimant's productivity. On July 9, 2011, the claimant was supposed to finish a job. Mark Culver, the owner, understood that the job would take less than an hour. The job took almost four hours. Mr. Culver felt that the claimant had misrepresented his ability to shingle a roof and was not doing as much work as he said he could do. There were two conversations with the claimant in which the claimant was told to pick up the pace. Mr. Culver felt that he could no longer keep the claimant on as an employee.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The legal definition of misconduct excludes unsatisfactory job performance, unless that job performance amounts to wanton carelessness. The employer has the burden of proof to establish misconduct.

The evidence in this case is insufficient to establish misconduct. Mr. Culver clearly was unhappy with the claimant's job performance and expected the claimant to produce more, i.e., lay more shingles in an hour. Mr. Culver felt he had been misled by the claimant on how fast he could work. The claimant and Mr. Culver do not agree on how many shingles the claimant was actually laying down. The claimant testified that Mr. Culver told him that this was "just not working out." The administrative law judge concludes that Mr. Culver had good business reasons for terminating the claimant. He was not producing the quantity of work desired. However, unsatisfactory job performance is not misconduct in this case. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's decision dated August 1, 2011, reference 03, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw