

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHAWN J ANDREWS
Claimant

APPEAL NO. 13A-UI-09426-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

VAN DIEST SUPPLY CO
Employer

OC: 07/21/13
Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Shawn Andrews filed a timely appeal from a representative's decision dated August 8, 2013, reference 01, which denied unemployment insurance benefits. After due notice, a telephone hearing was held on September 19, 2013. Claimant participated. The employer participated by Ms. Carolyn Cross, Mr. Lee Trask and Mr. Brett Henderson.

ISSUE:

The issue is whether the claimant was discharged for misconduct in connection with his work.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Shawn Andrews was employed by Van Diest Supply Co. from August 30, 2011 until July 19, 2013 when he was discharged from employment. Mr. Andrews was employed as a full-time production operator and was paid by the hour. His immediate supervisor was Brett Henderson.

Mr. Andrews was discharged on July 19, 2013 after he was observed violating the company's rule that strictly prohibits the possession or use of tobacco products on company property. Approximately three hours after Mr. Andrews had arrived at work he was personally observed by the night manager, Mr. Henderson, with what appeared to be a bulge in the left side of his cheek. Mr. Henderson specifically asked the claimant if he had chewing tobacco in his mouth and Mr. Andrews admitted that he did. The claimant was told to spit it out and the matter was reported to the company's vice president of manufacturing.

Mr. Andrews was called to a meeting with Mr. Trask, vice president of manufacturing and during the meeting he once again admitted violating the company's strict policy which prohibited the possession or use of tobacco products on company property. Mr. Andrews was aware of the policy which strictly prohibited the use of tobacco products and provided for the discharge of employees for violating the rule even if the violation only took place on one occasion. Because the company strictly enforces the policy, Mr. Andrews was discharged from his employment with the company at that time.

It is the claimant's position that the employer should have given him a second chance and the claimant feels that he is being used as an example by the company.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct in connection with the work. It does.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Conduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

In this matter the claimant was discharged for violating a known company policy which strictly prohibited the use or possession of tobacco products on company property. The claimant knew or should have known that violation of the policy would result in termination even on the first offense. The administrative law judge is aware that it is the claimant's position that he "forgot"

to remove the tobacco product from his mouth when he reported to work. The administrative law judge finds this testimony to strain credibility as the evidence establishes that Mr. Andrews had been on duty for approximately three hours before being observed violating the rule.

For the reasons stated herein, the administrative law judge concludes the employer has sustained its burden of proof in establishing disqualifying misconduct on the part of Mr. Andrews. Unemployment insurance benefits are withheld.

DECISION:

The representative's decision dated August 8, 2013, reference 01, is affirmed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs