

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSEPH A ANDERS
Claimant

APPEAL NO. 11A-UI-07477-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERICAN TESTING & TRAINING INC
Employer

OC: 05/08/11
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated June 3, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 29, 2011. Claimant participated. Employer participated by Deborah Ivan, secretary. The record consists of the testimony of Deborah Ivan; the testimony of Joseph Anders; Claimant's Exhibit A; and Employer's Exhibit One.

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 provides asbestos removal services. The claimant was hired on April 19, 2000. He was a full-time laborer/supervisor. His last day of work was May 6, 2011. He was terminated on May 6, 2011.

The incident that led to the claimant's termination occurred on May 6, 2011. The claimant and the company president, Stephen Intlekofer, engaged in a heated argument over whether some asbestos had been left on the job site. As a result of this heated argument, the claimant was told to get off the job. The claimant does not recall whether he used profanity when arguing with Mr. Intlekofer. Mr. Intlekofer did not testify at the hearing nor did any other employee who was personally present. The claimant had received warnings previously concerning his language and disrespect on the job.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. The use of profanity or disrespectful language can constitute misconduct as can insubordination. The legal definition of misconduct excludes errors of judgment or discretion. The employer has the burden of proof to establish misconduct.

In this case, the employer has failed to provide sufficient evidence of misconduct. Mr. Intlekofer, the individual who had the argument with the claimant and who terminated the claimant, did not testify at the hearing. The only eyewitness testimony is from the claimant. The claimant acknowledged that he did have a heated argument with Mr. Intlekofer but that argument was over the job itself. The two of them had a disagreement on whether all of the asbestos had been removed from the job site. The argument escalated and finally the claimant was asked to leave the job site.

The administrative law judge concludes that the claimant used poor judgment in escalating the argument with his employer and should have realized that there was a volatile situation brewing. He cannot recall if he used profanity or not. The claimant had strong views on how the job should be performed. However, absent eyewitness testimony from Mr. Intlekofer or someone

else who was present, the administrative law judge does not have sufficient evidence to find misconduct. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated June 3, 2011, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs