

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DANIEL B DRAPER**

Claimant

**APPEAL NO. 16A-UI-11644-TN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**VENUWORKS OF CEDAR RAPIDS LLC**

Employer

**OC: 10/02/16**

**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Venuworks of Cedar Rapids LLC, the employer, filed a timely appeal from a representative's October 21, 2016, reference 01, decision that held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on November 10, 2016. Claimant participated. Participating as witnesses for the claimant were Jennifer Draper, claimant's spouse, and Ms. Cynthia Lee, claimant's mother-in-law. The employer participated by Mr. Joshua Opperman, Human Resource Specialist; Ms. Sharon Cummins, Executive Director; Ms. Angela Wieck, Director of Human Resources; Ms. Janna Graber, Human Resource Coordinator, and Mr. David Kelly, Director of Food and Beverages. Employer's Exhibits A, B, C, D, E, and F were admitted into evidence.

**ISSUE:**

The issue is whether the claimant engaged in intentional misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered the evidence in the record, the administrative law judge finds: Daniel Draper was employed by Venuworks of Cedar Rapids LLC on April 12, 2013 until October 3, 2016 when he was informed of his termination from employment based upon the employer's belief that Mr. Draper had attempted to perform services for the company without being medically released to do so, and because the employer believed that the claimant had been insubordinate during an incident that occurred on Saturday, September 24, 2016. Mr. Draper at the time of the job separation was employed as a full-time assistant food and beverage manager and was paid by salary. Venuworks of Cedar Rapids LLC provides management services and support services to three employment venues in the greater Cedar Rapids, Iowa area. It appears that Mr. Draper primarily worked in the company's paramount theater venue.

On September 11, 2016, the claimant received a head injury in a non-work-related incident. Because of his non-work-related concussion, Mr. Draper was not able to return to work at the conclusion of a two-week vacation. On September 16, 2016, the claimant provided a medical

excuse to his employer medically excusing him from reporting to work pending a follow-up evaluation for his head injury that was to be conducted at a later date. Because of his non-work-related injury and the doctor's statement, the claimant was placed on medical leave by Venuworks of Cedar Rapids LLC pending his full release to return to employment. On September 22, 2016, Mr. Draper supplied a second medical statement excusing him from work until a follow-up appointment that was to be held one week later. Because the claimant's injury was non-work-related, the company was awaiting a full release from Mr. Draper's medical practitioner before the claimant would be allowed to return to work. The company generally requires a full release before allowing an employee to return to work from a non-work-related illness or injury.

On Saturday, September 24, 2016, the City of Cedar Rapids, Iowa through local media was requesting volunteers to assist with sandbagging preparations for flooding that was imminent in the city's downtown area as well as other portions of the city. Venuworks as well as numerous other companies had made general requests for volunteer assistance from the public.

On the morning of September 24, 2016, the claimant, along with his wife and mother-in-law, went to a number of sandbagging locations to assist in response to the city's calls for volunteers. Mr. Draper, his wife and his mother-in-law volunteered to fill sandbags at various locations within the city. When a location had too many volunteers or did not have sufficient bags and materials for bagging, they would travel to a different location within the city to assist.

After attempting to assist in flood preparations in the downtown area at approximately two locations, the threesome traveled to near the paramount theater in downtown Cedar Rapids where a large supply of sand and bagging materials were available for volunteers. Mr. Draper, his wife and his mother-in-law worked with others on a sidewalk and street area adjacent to the paramount theater filling sandbags. Mr. Draper believed that the activity was not contrary to any doctor's orders because he could work at his own pace, he could rest if he needed to, and he had two family members present to monitor his wellbeing. In addition to numerous other volunteers, Mr. Draper saw a number of company employees in the area traveling in and out of the paramount theater building. Mr. Draper remained on the public thoroughfare and sidewalk as he performed his volunteer work. A short time later, the claimant was approached by Jason Laster, a Venuworks employee. When the employee suggested that the claimant come inside the theater building where his services could be better used, Mr. Draper declined to do so because he had previously been told that he could not return to work until he was fully released. Claimant believed that performing the flood control work on the street and sidewalk area would not be viewed as returning to work, but working inside might be considered to be a violation.

A short time later, Mr. Draper was approached by Sharon Cummins, the facility's executive director. Ms. Cummins spoke to the claimant privately and emphasized it was not appropriate for the claimant to be there because he had not been released to return to work. Claimant stated his belief that assisting with the flood control on the sidewalk or on the street area without medical authorization would not be a violation of the company's policies and the executive director again told him that he needed to leave. Mr. Draper agreed stating that he would "go somewhere else to sandbag." Mr. Draper informed his wife and his mother-in-law that he needed to leave the area and did so.

Because of the flooding that appeared to be imminent, Venuworks had earlier in the day made a request for volunteers to assist in sandbagging through a second party organization that recruited volunteers. If Venuworks managers recognized any volunteers who were Venuworks employees, the company had the employees sign in for work that day for the purpose of insuring that they were paid for their services and properly covered for workmen's compensation

purposes. Upon reviewing the matter that day, Ms. Cummins concluded that the claimant had intentionally violated company rules by coming to the employer's work location to provide services in employment without first being fully released by his doctor and subjected the company to potential liability by performing services for the company while off the clock. Ms. Cummins also concluded that claimant had been insubordinate when he had stated that he intended to continue to sandbag at a different location by both the content of his statement and the tone in which it was stated.

Although Mr. Draper had not been warned or counseled about anything similar in the past, the company chose to escalate to discharge rather than issuing a lesser form of discipline. As a salaried employee in an exempt status, Mr. Draper had not been required to sign in or out of work, however, the requirement that he do so had recently been implemented on a trial basis. The claimant had made no attempt to sign in at work when he had arrived that day.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was discharged from employment under non disqualifying conditions.

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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing job disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants the denial of unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not always serious enough to warrant a denial of unemployment insurance benefits. Such misconduct must be “substantial.” When based upon carelessness, the carelessness must actually indicate a “wrongful intent” to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. Based upon the evidence in the record, the administrative law judge concludes that the claimant’s conduct in engaging in volunteer flood preparation work near his place of employment on September 24, 2016 was at worse an isolated instance of poor judgment in an otherwise unblemished employment history. The claimant had not been previously warned about any of the issues leading to his separation from employment and the employer has not met its burden of proof to establish the claimant acted deliberately or with repeated carelessness in following company rules, policies or procedures so as to constitute intentional, disqualifying misconduct. The claimant had answered a general call for flood work volunteers in the area and had gone to a number of other sites before arriving at a site near one of the employer’s venues where sufficient materials were available to assist in the flood preparation. The claimant had made a considered effort not to enter what he believed to be the physical property of the employer’s venue because he did not want to appear to be working solely for the benefit of the company without first following the employer’s requirement that he obtain a full doctor’s release. When invited to enter the premises by another employee, Mr. Draper refused and stated he would only do so with the express permission of Venuworks management. When the executive director spoke to the claimant directly about the issue a short time later, he explained his belief that doing volunteer flood work from a public sidewalk or street was not contrary to the employer’s interests and the claimant did not refuse to follow Ms. Cummins’ directives to leave the area. The claimant’s statement that he wanted to continue to do volunteer flood work in a different area that day was not in and of itself misconduct sufficient to warrant the denial of unemployment insurance benefits.

In his testimony, Mr. Draper explained that he did not feel the voluntary work would violate his doctor’s limitations because it was not stressful work and as a volunteer he could pace his effort and rest whenever needed. Claimant also had two family members present to monitor his activity and assist him, if necessary.

The question before the administrative law judge in this case is not whether the employer has a right to discharge the claimant for these reasons, but whether the claimant’s discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate Mr. Draper may have been a sound decision from a management viewpoint, for the

above-stated reasons the administrative law judge concludes that intentional disqualifying misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits has not been shown. Accordingly, the claimant is eligible to receive unemployment insurance benefits, provided that he meets all other eligibility requirements of Iowa law.

**DECISION:**

The representative's decision dated October 21, 2016, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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