

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAM A BURN
Claimant

APPEAL NO. 09A-UI-18560-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CLINTON STAFFING COMPANY
Employer

OC: 11/01/09
Claimant: Respondent (5)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 7, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 26, 2010. Claimant William Burn did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Susan Watkins, Client Relations Manager, represented the employer. Exhibit One was received into evidence.

ISSUE:

Whether the claimant separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a temporary employment agency. William Burn established his employment relationship with Allstar Staffing on March 3, 2009 and performed work in four temporary employment work assignments. The final assignment was at Clausen Warehouse in Clinton. Mr. Burn started the assignment on March 14, 2009. Mr. Burn worked full-time hours unloading trailers. Mr. Burn's supervisor at Clausen Warehouse was Wanda Huff, Warehouse Production Supervisor.

Mr. Burn worked in the assignment until October 2, 2009, when a Clausen Warehouse representative contacted Allstar Staffing to request Mr. Burn's removal from the assignment. On October 2, Teresa Duran, a production supervisor at Clausen Warehouse, had directed Mr. Burn to move some boxes and Mr. Burn had responded that it was not in his job description. Mr. Burn subsequently moved the boxes.

At the end of the day, Susan Watkins, Client Relations Manager, notified Mr. Burn that he was being discharged from the assignment. Allstar Staffing was not willing to place Mr. Burn in further assignments until after he worked somewhere else and generated a new positive work reference. Allstar Staffing did not have another assignment for Mr. Burn.

Allstar Staffing had receiving occasional reports from Clausen Warehouse that Mr. Burn was putting forth less than a full effort. Prior to October 2, the most recent such report documented by Allstar Staffing was documented on July 31, 2009.

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.

The employer has the burden of proof in a discharge. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment 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. App. 1992).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976). The administrative law judge notes that the employer has not presented testimony from Ms. Duran or anyone else who witnessed the alleged refusal on October 2, 2009.

The weight of the evidence indicates that on October 2, 2009, Mr. Burn unreasonably refused a supervisor's reasonable directive that he move some boxes, a task within the scope of his regular duties. The evidence indicates that Mr. Burn subsequently performed the assigned task. Though the employer had prior occasion reports that Mr. Burn was not performing to the client's satisfaction, the evidence fails to establish any other instances where Mr. Burn refused to perform an assigned task. Because there were not repeated refusals to perform assigned tasks, the evidence does not establish insubordination within the meaning of the law. While the evidence indicates that Mr. Burn has previously failed on occasion to perform the client's satisfaction, this did not rise to the level of misconduct and would not disqualify him for unemployment insurance benefits.

The weight of the evidence indicates that Mr. Burn's discharge from the assignment also effected a discharge from Allstar Staffing—as the temporary employment agency was unwilling to place Mr. Burn in a further assignment until he worked elsewhere and generated a new positive reference.

The weight of the evidence indicates that Mr. Burn's remark, "that's bullshit, whatever," was uttered after the employer delivered the news that he was discharged, not prior, and thus, was not the basis for the discharge from the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Burn was discharged for no disqualifying reason. Accordingly, Mr. Burn is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Burn.

DECISION:

The Agency representative's December 7, 2009, reference 01, decision is modified as follows. The claimant was discharged from the assignment and from the employment for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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