

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DENNY W LETZE

Claimant

APPEAL NO. 100-UI-02196-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

G & K SERVICES COMPANY

Employer

OC: 10/18/09

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

An appeal was filed from an unemployment insurance decision dated November 4, 2009, reference 01, that concluded the claimant was discharged from unemployment insurance benefits based upon his separation from G & K Services Company. A hearing was held in Des Moines, Iowa on December 16, 2009. The claimant participated but the employer did not. The administrative law judge entered a decision allowing benefits on December 18, 2009. The employer timely appealed to the Employment Appeal Board. On February 3, 2010, the Employment Appeal Board remanded the matter for another hearing as the employer had not received notice for the first hearing. After due notice, a telephone conference hearing was scheduled for and held on March 29, 2010. The claimant participated personally and was available to provide sworn testimony. Although duly notified, the employer did not respond to the notice of hearing and did not participate. The claimant elected to stand on the previous hearing record and the administrative file. Based upon the employer's failure to participate in the hearing, the administrative file and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law and decision.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: The claimant worked for G & K Services from May 15, 2007 until October 19, 2009 when he was discharged based upon the employer's belief that the claimant violated a company policy that prohibited smoking in company trucks. Mr. Letze worked as a full-time unloader.

The claimant denies and denied at all times violating the company policy against smoking in the truck testifying that other employees had access to the truck and that he did not violate the rule.

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

While past warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. Termination of employment must be based upon a current act. See 871 IAC 24.32(8).

Allegations of misconduct 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 Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The claimant appeared personally in this matter and provided sworn testimony denying violating the company rule and providing a reasonable explanation for cigarette butts and ashes found in the area. There being no evidence in the record to the contrary, the administrative law judge must conclude that the employer has not sustained its burden of proof in establishing intentional disqualifying misconduct sufficient to warrant the denial of unemployment insurance benefits. Benefits are allowed, providing the claimant is otherwise eligible.

DECISION:

The department decision dated November 4, 2009, reference 01, is reversed. Claimant was discharged for no disqualifying reason. Benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs