

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DANIEL L STRAW**  
Claimant

**APPEAL NO. 07A-UI-00193-L**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MIDWEST BASEMENT SYSTEMS INC**  
Employer

**OC: 12-03-06 R: 02  
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the December 28, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 28, 2007, in Des Moines, Iowa. Claimant participated and was represented by Brian Nelson, Attorney at Law. Employer participated through Bill Heady, co-owner and production manager, and Nathan Evans, sales and marketing manager, and was represented by Matthew Cunningham, Attorney at Law. Employer's Exhibit 1 was received.

**ISSUE:**

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time salesperson from October 24, 2001 through November 6, 2006, when he was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits. Tim Heady, co-owner, with Bill Heady decided to fire claimant because a final incident on November 2 when Bill Heady, production manager and co-owner, alleged he smelled alcohol on his breath while looking at a possible pier job near New Virginia. Heady did not confront claimant at the time or ask him to submit to a drug screen. There were no prior warnings for any similar or dissimilar employment-related issues. Claimant never referred work to others that employer was in the business of doing. He did not change any warranty information after he discussed it with Tim Heady and was told employer would not agree to rewrite the warranty at a customer's request.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job 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 claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on 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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as employer has not established, with any degree of credibility, that claimant consumed alcohol at all, on the job, or sufficiently close in time to the employment that it affected his work, it has not met the burden of proof to establish misconduct. The claimant was entitled to fair warning that the employer was no longer going to tolerate his alleged performance and/or conduct. Without fair warning, the claimant had no way of knowing that there were changes he needed to make in order to preserve the employment. Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

**DECISION:**

The December 28, 2006, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw