

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOSE O MUNOZ**

Claimant

**APPEAL NO. 11A-UI-07423-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ADVANCE SERVICES INC**

Employer

**OC: 11/14/10**

**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Jose O. Munoz (claimant) appealed a representative's June 2, 2011 decision (reference 07) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Advance Services (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 30, 2011. The claimant participated in the hearing. Jessica Braun appeared on the employer's behalf. During the hearing, Employer's Exhibits One and Two were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The employer is a temporary employment firm. The claimant began taking assignments with the employer on January 6, 2010. His final assignment began on March 28, 2011. He worked full-time as a general laborer at the employer's business client out of the employer's Sioux City, Iowa office. His last day on the assignment was May 5, 2011. The assignment ended because the business client determined to end it on that date. The reason asserted for the ending of the assignment was the claimant using his cell phone on the work floor and sleeping on the work floor; the employer alleged that both incidents had occurred on May 5.

The claimant acknowledged that there was one time early in the assignment when he had used his cell phone on the work floor; he had been given a verbal warning at that time. The claimant testified that since that time, the only time he used his cell phone at work was on authorized break times, which was permitted. The employer asserted that the claimant had used the cell phone on the work floor on May 5, but had no specific information to verify that assertion; the employer's information came from a verbal report by one of the business client's supervisors to the business client's human resources representative, who transmitted a summary statement to the employer.

The employer presented a picture that appears to be of a person sitting with his hooded head bent over. The claimant acknowledged that he was the person in the picture, but he denied that the incident occurred on May 5 or that he was sleeping. Rather, he indicated that this occurred sometime prior to May 5 when he was sitting while waiting for parts to come through for processing, and that other coworkers were “kidding around” and took the picture of him. The employer had no specific information to verify its assertion that the event occurred on May 5; the employer’s information again came from only from the verbal report by one of the business client’s supervisors to the business client’s human resources representative, who transmitted the summary statement to the employer.

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

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant’s employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer’s interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is that the claimant was sleeping on the work floor and using his cell phone on the work floor on May 5, 2011. Conduct asserted to be disqualifying misconduct must be both specific and current. Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988); West v. Employment Appeal Board, 489 N.W.2d 731 (Iowa 1992). “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.” 871 IAC 24.32(4).

The claimant, under oath, denied sleeping on the work floor at any time, denied that the picture of him sitting with his head down occurred in the time frame of May 5, and denied that he used his cell phone other than at break any time near May 5. The employer relies exclusively on the second-hand or third-hand account from the business client which contained no details. The

administrative law judge is unable to ascertain whether the business client's supervisor and human resources person might have been mistaken or whether they are credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of the report from the business client. Assessing the credibility of the witnesses and the reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant used his cell phone on the work floor or was sleeping while on duty at any time current to May 5. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

**DECISION:**

The representative's June 2, 2011 decision (reference 07) is reversed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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