

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CLARENCE HUDSON
Claimant

APPEAL NO. 11A-UI-15889-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

ELITE FLAGGING INC
Employer

OC: 10/30/11
Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated December 6, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 18, 2012. Claimant participated. Thelma Hudson and James Cullins were witnesses for the claimant. The employer participated by Jim Young, director of operations. Donald Bascom was a witness for the employer. The record consists of the testimony of Jim Young; the testimony of Donald Bascom; the testimony of Clarence Hudson; the testimony of Thelma Hudson; and the testimony of James Cullins.

ISSUE:

Whether the claimant was discharged for misconduct

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The employer provides traffic control at road construction sites. The claimant was re-hired on March 1, 2011. The work is seasonal in nature. The claimant would initially start out part time and then work full time as the season progressed. The claimant's last day of work was on or about June 12, 2011. The claimant was terminated on June 15, 2011.

The incident that led to the claimant's termination occurred on or about June 15, 2011. The day before a crew from the employer had left for a construction site in Storm Lake, Iowa. The crew included Jim Young, the director of operations; Donald Bascom, assistant scheduler; and the claimant's girlfriend -- Christina. Christina was pregnant but had assured the employer that she was physically able to work. Christina did not tell the claimant that she was going out of town to work. The claimant was upset and began making a series of phone calls to other employees. He called Donald Bascom at 10:30 p.m.; 12:00 a.m.; 12:30 a.m. and 1:00 a.m. These calls were interrupting sleep. All employees had to be at the job site at 6:00 a.m. The claimant was

told not to make any more calls. At 1:30 a.m. he called Mr. Young. He told Mr. Young that if anything happened to his baby that he (the claimant) would deal with Mr. Young personally. Mr. Young considered this a personal threat. He terminated the claimant.

REASONING AND CONCLUSIONS OF LAW:

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.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Threats of physical violence can be misconduct. In Henecke v. IDJS, 533 N.W. 2d 573 (Iowa App. 1995), the Iowa Court of Appeals ruled that the threat that employer should stay out of a worker's way or he would be sorry constitutes misconduct. The Court stated that an employer has the right to expect decency and civility from its workers and that evidence of threats could be found both in words and body language. Insubordination, which is the continued failure to follow reasonable instructions, constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990) The employer has the burden of proof to establish misconduct.

The evidence in this case showed that the claimant was upset because his girlfriend, who was pregnant, was on an out of town crew that was working in Storm Lake, Iowa. Inexplicably she did not tell the claimant that she was working out of town. The claimant expressed his anger over her job to several employees in a series of phone calls that took place late on June 14,

2011, and the early morning hours of June 15, 2011. The claimant had been told to stop calling as the crew needed to get some sleep. The claimant deliberately violated this instruction. Finally he called Jim Young at 1:30 a.m. The parties do not agree on what the claimant said to Mr. Young. Mr. Young credibly testified that the claimant told him that if anything happened to his baby that he would deal with Mr. Young personally. The claimant said that he told Mr. Young that Mr. Young would see his lawyer. Mr. Young disputed that because he would not have been afraid of a lawyer. He was, however, concerned with a personal threat to his safety. The administrative law judge concludes that the claimant did use words that could reasonably be interpreted as a personal threat.

The claimant breached his duty of geniality and civility by making constant phone calls to employees and then by threatening Mr. Young. The claimant deliberately disobeyed a request to stop calling and persisted in making calls until 1:30 a.m. This pattern of conduct shows that the claimant chose to engage in conduct that he had been told to stop. The claimant took out his anger with his girlfriend by harassing the employer and after he was told to stop. This is misconduct. Benefits are denied.

DECISION:

The decision of the representative dated December 6, 2011, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs