IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

Appeal Number: 05A-UI-11342-RT
OC: 10/02/05 R: 01
Claimant: Appellant (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

JOSEPH H CLOVER
3916 OLD LAKEPORT RD
SIOUX CITY IA 51106

SIOUX CITY BRICK & TILE CO
PO BOX 807
SIOUX CITY IA 51102-0807

RICHARD STURGEON
PO BOX 3372
SIOUX CITY IA 51102-3372

STEVEN GERHART
ATTORNEY AT LAW
310 S FLOYD BLVD
SIOUX CITY IA 51102

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Joseph H. Clover, filed a timely appeal from an unemployment insurance decision dated October 25, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on December 1, 2005, with the claimant participating. The claimant was represented by Richard Sturgeon. Bill Heckart, Plant Superintendent, participated in the hearing for the employer, Sioux City Brick & Tile Company. The employer was represented by Steven Gerhart, Attorney at Law. David Clausen, Manager of Safety and Personnel, was available to testify for the employer but not called because his testimony would have been repetitive and unnecessary. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

An initial hearing was scheduled in this matter on November 21, 2005 at 9:00 a.m. and rescheduled at the employer's request. At 11:42 a.m. on November 22, 2005, the administrative law judge spoke to Mr. Clausen who requested a second continuance in order to obtain the services of an attorney. The administrative law judge denied the request for a continuance because the employer had already been granted one continuance and an attorney, although welcome to participate in the hearing, is not required to participate in a hearing. The administrative law judge denied the employer's request for a second postponement. The employer appropriately participated in the hearing and was represented by an attorney.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time laborer from April 28, 2005 until he was discharged on September 6, 2005. The claimant was discharged for sleeping or loafing on the job while on duty in violation of Rule 8, Section A, which rule is in the employer's handbook. The claimant received a copy of the handbook and signed an acknowledgement therefore. Although not necessarily aware of the rule, the claimant was aware that sleeping or loafing on the job while on duty is inappropriate. A violation of a Section A rule is grounds for dismissal. Section B rules require progressive disciplines but the claimant was accused of loafing on the job, which is a Section A violation, calling for immediate dismissal.

On September 6, 2005, the claimant reported to work at the new plant as he had been instructed to do the day before. The claimant began sweeping at the new plant but then left and went to the batching plant between 300 and 500 yards from the new plant. The employees were not sent directly to the old plant because a machine was being set up. When the machine was set up in the old plant, the employer's witness, Bill Heckart, Plant Superintendent, went to the new plant and gathered up the employees and took them to the old plant. When he got to the old plant he noticed that the claimant was missing. He looked everywhere for the claimant, both in the old plant and in the new plant, and could not find the claimant. He even asked co-workers if they had seen the claimant, and they had not. Mr. Heckart then decided to check the batching plant. He went up to the batching plant and went inside and saw no evidence that the claimant has been inside the batching plant. The batching plant is very dusty and a great deal of dust accumulates on the floor and footprints and other tracks can be seen in the dust but Mr. Heckart saw no such signs. He then went outside and turned around the corner and saw the claimant smoking while leaning against the building. The claimant was not on any established break from the employer. The employer has two established breaks, one in the morning and one in the afternoon. The claimant had been specifically told that he was not to take smoking breaks or other breaks on the employer's time, but only during the established breaks. No one in a position of authority had instructed the claimant to go to the batching plant.

The claimant testified that while cleaning the new plant he asked Ron Allen, a Union Steward, if he should go to the batching plant and Mr. Allen said that was okay. The claimant then testified that he went to the batching plant and was cleaning the batching plant but took a break outside for a couple of minutes to catch his breath because of the dust in the batching plant. The claimant did not have a respirator. However, when the employer is aware that an employee is going to go to the batching plant it issues a respirator to the employee. No such respirator was issued to the claimant on September 6, 2005. The claimant was represented by a union steward, Ron Allen at his discharge, but no union grievance was filed.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on September 6, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, Bill Heckart, Plant Superintendent, credibly testified that on September 6, 2005, when he could not find the claimant at the old plant after going to the new plant to get all of the employees and return to the old plant, he began searching for the claimant. Mr. Heckart credibly testified that he could not find the claimant either at the old plant or at the new plant. The claimant was supposed to report to the new plant and clean the new plant. Mr. Heckart then testified credibly that he went

to the batching plant, which is between 300 and 500 yards from the new plant, and after looking inside and not seeing the claimant, looked around the corner and found the claimant there leaning against the building smoking a cigarette. Neither Mr. Heckart nor anyone in a position of authority had sent the claimant to the batching plant. The claimant was supposed to be at the new plant cleaning the new plant until he was told, along with the other employees, to go to the old plant. When the claimant was observed by Mr. Heckart he was not on any established break. The employer has two established breaks for employees; one in the morning and one in the afternoon. The employees are informed at meetings, and the claimant was specifically told, that breaks or smoking on the employer's time is not allowed. The employer has a rule at Rule 8, Section A in its handbook prohibiting sleeping or loafing on the job while on duty and such a violation is grounds for immediate dismissal.

The administrative law judge concludes that the claimant was loafing on the job. The administrative law judge concludes that the claimant was at the batching plant, a significant distance from where he was supposed to be in the new plant smoking and leaning against a building while not on an established break and the claimant was not instructed by anyone in a position of authority to even be at the batching plant. The claimant's testimony to the contrary is not credible. The claimant testified that he arrived at the new plant on September 6, 2005 and nobody told him anything so he began sweeping the new plant and then spoke to Ron Allen about going to the batching plant and when Mr. Allen said that was alright he went to the batching plant. However, the claimant conceded that normally supervisors tell the claimant what he is to do. The claimant testified that there was no supervisor around. This is not credible. If the claimant had nothing to do at the new plant, he should have sought out a supervisor rather than speaking to someone who was not a supervisor and then going to the batching plant, which is 300 to 500 yards away. Further, the claimant testified that when he is officially sent to the batching plant for cleaning, the employer issues a respirator, but on September 6, 2005, the claimant had no respirator. This certainly indicates that the claimant was not officially directed to the batching plant or he would have had a respirator. The claimant also could not explain why, if he was simply on a break for a couple of minutes to catch his breath from the dust, that he went around the building to take his break. The claimant even conceded that the batching plant is very dusty and footprints would be visible if someone had walked in the batching plant. Mr. Heckart credibly testified that he saw no such footprints. On the evidence here, the administrative law judge must conclude that the claimant was loafing on the job by going to the batching plant and basically hiding around a corner to smoke his cigarette and lean against a building.

Because the employer has a clear policy against loafing and has established breaks for the employees to use, the administrative law judge is constrained to conclude that the claimant's actions in going to the batching plant and going around a corner and smoking while leaning against a building when he should have been at the new plant is a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and is disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

DECISION:

The representative's decision of October 25, 2005, reference 01, is affirmed. The claimant, Joseph H. Clover, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct.

dj/kjw