

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WESLEY A CLARK

Claimant

APPEAL NO. 12A-UI-06374-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMCOR RIGID PLASTICS USA INC

Employer

OC: 04/29/12

Claimant: Appellant (1)

Section 96.5-2-A – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated May 21, 2012, reference 01, which held that the claimant was not eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 22, 2012. Claimant participated. The employer participated by Jolene Malone, the human resources manager; Wayne McCabe, the production manager; and Sean Bitters, the production supervisor. The employer was represented by Pixie Allan. The record consists of the testimony of Jolene Malone; the testimony of Sean Bitters; the testimony of Wayne McCabe; the testimony of Wesley Clark; and Employer's Exhibits 1-10.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

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

The employer manufactures plastic containers at its facility in Ames, Iowa. The claimant was hired on August 2, 2010, as a machine operator 2. He was a full time employee. The claimant's last day of work was April 30, 2012. The claimant was terminated on May 3, 2012.

The incident that led to the claimant's termination occurred on the night shift from April 29, 2012, through April 30, 2012. The claimant was leaning into a "buckhorn", which is a four foot square container, and was using his cell phone. The use and possession of a cell phone on the production floor was strictly prohibited by the employer. The cell phone policy had been reiterated to the claimant and other employees in a meeting on March 29, 2012. The supervisor who noticed the use of the cell phone reported it to Sean Bitters. Mr. Bitters knew that the claimant was on a final written warning. He sent the claimant home pending an investigation.

The claimant's final written warning was due to falsification of company documents. The final warning was given on April 13, 2012. The incident that led to the final warning occurred on

March 30, 2012. In his records for that day, the claimant indicated that he had done the required visual inspections and what is known as a go/no go gauge test four times during a nine-hour period. The product was so defective that the employer concluded that the tests could not have possibly been done by the claimant. The defect would have been visible to the naked eye and would have been a “no go” had the gauge test been done.

The claimant's initial written warning was given on February 23, 2012, for an incident that occurred on February 21, 2012. A lock had been placed on a maintenance tricycle. The claimant liked to ride the tricycle even though it was for the use of the maintenance department only. He thought the lock was “a joke” and bypassed the lock so that he could ride the tricycle. This was considered to be a serious safety violation. (Exhibit 1)

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.

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.

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. An employer can reasonably expect that an employee will follow work rules instituted by the employer. 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 show misconduct.

The evidence in this case established an ongoing pattern of wanton disregard of the employer's rules. The final incident concerned use of the cell phone on the production floor. The claimant was discovered leaning into a buckhorn and having his cell phone in his hands. The most reasonable inference from the evidence is that he was attempting to hide his use of his personal cell phone. The claimant's testimony that he was permitted to have his cell phone on the production floor is not credible. He had previously acknowledged to the employer that he knew he was not supposed to have the phone in his possession. He attempted to justify having the phone by saying first that he needed to check the time. Clocks were readily available on the floor. He also said he had to be available for emergencies from home. The claimant never told the employer that he needed his phone for an emergency situation.

The claimant's prior disciplinary actions were for falsification of records and removal of a pad lock on a vehicle. He knew his job was in jeopardy and yet he elected to violate a known policy against the use of cell phones. This was a deliberate choice on his part and constitutes misconduct. Benefits are therefore denied.

DECISION:

The decision of the representative dated May 21, 2012, 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/css