

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

CHRISTOPHER L GARCIA
1021 - 3RD AVE SE APT 15
CEDAR RAPIDS IA 52403

ELLIOTT OIL COMPANY
PO BOX 473
OTTUMWA IA 52501

Appeal Number: 05A-UI-00547-JTT
OC: 12/19/04 R: 03
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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Christopher Garcia filed a timely appeal from the January 13, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 14, 2005. Mr. Garcia participated. Elliott Oil Company participated through Judi Moorman, Store Manager.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Garcia was employed as a full-time sales associate, i.e. service station cashier, from June 2004 to August 19, 2004, when Ms. Moorman discharged him for misconduct.

On August 19, 2004, Ms. Moorman was not scheduled to work, but stopped at the service station on personal business. As she pulled up to the station, she observed Mr. Garcia exiting the station wearing an audio headset and “air drumming” with actual drumsticks. Ms. Moorman made several attempts to get Mr. Garcia’s attention by first calling to him and yelling at him. Ms. Moorman eventually got Mr. Garcia’s attention. Ms. Moorman then discussed with Mr. Garcia that she had previously instructed him not to be “air drumming” and to leave his drumsticks in his backpack while at work. Ms. Moorman then advised Mr. Garcia that he was discharged from the employment based on his failure to follow her previous warning.

Approximately four weeks prior to the discharge, Ms. Moorman had discussed with Mr. Garcia that she had received several customer complaints about Mr. Garcia’s “air drumming” behavior. Mr. Garcia had apparently on one or more occasions caused a customer to be concerned that he or she was going to be accidentally struck by one of the drumsticks. Some customers had advised Ms. Moorman that they would not patronize the service station so long as Mr. Garcia remained in its employ. Ms. Moorman had observed Mr. Garcia’s “air drumming” behavior when she reviewed the surveillance video. Mr. Garcia did not confine this behavior to behind the cash register, but apparently moved about the store “air drumming.”

As a result of the customer complaints, Ms. Moorman had instructed Mr. Garcia not be “air drumming” and to keep his drumsticks in his backpack in the backroom of the station if he brought them to work at all. Ms. Moorman had also discussed the “air drumming” behavior with Mr. Garcia at the time he was interviewed for the position and had advised Mr. Garcia it would not be acceptable to engage in such behavior and to leave the drumsticks in his backpack during work. Mr. Garcia had thus been warned on at least two prior occasions to leave the drumsticks out of sight and not to be “air drumming” while at work.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Garcia was discharged for misconduct in connection with his employment.

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).

Since Mr. Garcia was discharged, the employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record establishes that Mr. Garcia repeatedly and willfully disregarded Ms. Moorman's requests to cease playing with musical drumsticks while at work. Ms. Moorman's instruction that Mr. Garcia not engage in fantasy "air drumming" at work was reasonable. Such behavior served no legitimate purpose in the employment and amounted to horseplay. Such behavior apparently had caused customers concern that they might be injured as a result of Mr. Garcia waiving about the drumsticks. Even without the threat of injury, customers were apparently put off by the immature display and indicated to Ms. Moorman their intention to cease doing business with the store. Under the applicable administrative rule and the cases cited above, Mr. Garcia's conduct amounted to insubordination and misconduct. Accordingly, a disqualification will enter.

The administrative law judge caught a glimpse of Mr. Garcia's level of maturity during the hearing when Mr. Garcia referred to his drumsticks as his "pacifier," made a thinly veiled threat of appealing the administrative law judge just as the hearing was getting under way, and repeatedly attempted to commandeer the hearing process. The administrative law judge concluded that the Ms. Moorman's testimony was credible and that Mr. Garcia's testimony was not credible.

DECISION:

The Agency representative's decision dated January 13, 2005, reference 01, is affirmed. The claimant is disqualified from receiving benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

jt/sc