

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ERNEST R DILLARD**  
Claimant

**APPEAL NO. 13A-UI-05262-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DEN HARTOG INDUSTRIES INC**  
Employer

**OC: 03/24/13**  
**Claimant: Appellant (1)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the representative's decision dated April 24, 2013, reference 02, which held that the claimant was not eligible for unemployment insurance benefits. After due notice, a hearing was held on June 11, 2013 by telephone conference call. The claimant participated personally. The employer participated by Christine Koerselman, the human resources generalist. The record consists of the testimony of Christine Koerselman; the testimony of Ernest Dillard; and Employer's Exhibits 1-8.

**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 is a plastics company. The claimant was hired on April 9, 2012. His job was welder. He was a full-time employee. His last day of work was March 18, 2013. He was terminated on March 18, 2013.

The incident that led to the claimant's termination occurred on March 15, 2013. The employer has a written rule, of which the claimant was aware, that no tobacco products were to be used on the premises except in a designated place and at a designated time. The claimant was chewing tobacco on the plant floor. The plant floor is not a designated place for tobacco use nor was he on a designated break. The claimant spit the tobacco into a garbage can. He acknowledged that he had been chewing, apologized and commented that he forgot to take it out after break. (Exhibit 5) Spitting is also prohibited by the employer per a written policy.

The claimant was terminated as a result of this incident. The claimant had just had a three-day suspension, which he served on February 22, 2013; February 25, 2013; and February 26, 2013. (Exhibit 4) The claimant was suspended due to attendance violations. Previous write ups were for failure to report an injury; safety concerns; and job performance.

## 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 leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to 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 claimant is not eligible for unemployment insurance benefits. The claimant was discharged after he was discovered using tobacco on the production floor. He violated specific provisions of the employer's written policy on the use of tobacco and spitting. Although the claimant tried to deny that he had done this, the claimant's testimony is not credible. He did not provide a consistent version of events when asked very specifically about what had happened. He tried to

blame this write up on individuals with the employer who were out to get him. Although the claimant had not been written up before for violating the tobacco policy, he was written up for numerous violations of the employer's written policies. He had just served a suspension for violating the attendance policy and knew his job was in jeopardy. The claimant engaged in conduct that showed a persistent disregard of the employer's work rules. This is misconduct Benefits are denied.

**DECISION:**

The decision of the representative dated April 24, 2013, reference 02, is affirmed. The claimant is not eligible for unemployment insurance 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.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

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