

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID A VOLESKY
Claimant

APPEAL NO: 11A-UI-00185-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ENGINEERED PLASTIC COMPONENTS INC
Employer

**OC: 11/14/10
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

David A. Volesky (claimant) appealed a representative's December 29, 2010 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Engineered Plastic Components, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 11, 2011. The claimant participated in the hearing. Lindsee Detra appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on March 5, 2010. He worked full time as a press operator on a 3:00 p.m. to 11:00 p.m. shift. His last day of work was November 12, 2010. The employer discharged him on that date. The reason asserted for the discharge was poor work performance.

The claimant had received two verbal warnings for poor work performance in March 2010, a written verbal for poor work performance on April 28, 2010, and another written verbal for poor work performance on July 2, 2010. He received a second level written warning for a job performance issue on September 16, 2010. A third written warning would result in discharge.

The employer asserted that there was another job performance issue resulting in items not being produced to specifications between November 1 and November 12. However, the employer had no information or details about what the incident might have been. The claimant denied that there had been any further incident in November. Rather, he indicated that his supervisor told him that he was being discharged because he was "always complaining," as he had made a comment in passing on November 10 the he had been at the same machine for a

month instead of being routed around the various machines, and that maybe someone else could work on the machine he had been staffing “once in a while for a change.”

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is poor job performance. First, misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra. It is unknown what job the claimant most recently allegedly failed to perform correctly, so it is not possible to ascertain whether it was due to an error that could be characterized as intentional. Further, conduct asserted to be disqualifying misconduct must be both specific and current. Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988); West v. Employment Appeal Board, 489 N.W.2d 731 (Iowa 1992); 871 IAC 24.32(8). Here there is no evidence of a current act of misconduct as required to establish work-connected misconduct. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's December 29, 2010 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs