

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**VICTOR A STARK**

Claimant

**MIDWEST JANITORIAL SERVICE INC**

Employer

**APPEAL NO: 11A-UI-05329-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/08/10**

**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge  
871 IAC 24.32(1) – Definition of Misconduct  
871 IAC 24.32(8) – Current Act

**STATEMENT OF THE CASE:**

The claimant appealed a department decision dated April 11, 2011, reference 02, that held he was discharged for misconduct on February 23, 2011, and benefits are denied. A telephone hearing was held on May 17, 2011. The claimant participated. Gregg Trosky, Branch Manager, participated for the employer. Employer Exhibit 1 was received as evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with employment.

**FINDINGS OF FACT:**

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment as a part-time custodian on May 21, 2009, and last worked for the employer on February 23, 2011. Claimant averaged about 25 to 30 hours each work. The claimant received an employee handbook that contained the policies of the employer. The policy contains prohibitions for smoking on the job.

The employer issued claimant four written warnings for attendance policy violations from August 4 thru November 16, 2010. On February 23, 2011, a co-worker reported seeing the claimant smoking inside an employer account at the Galaxy 16 theatre. The door to the theatre has a no smoking sign. The employer discharged claimant for violation of the no smoking policy in light of his disciplinary history. Claimant admits smoking an “Easy Smoke” electronic cigarette in a designated smoking area at the theatre and that he had been doing so for a period of time.

## REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

The administrative law judge concludes the employer has failed to establish claimant was discharged for a current act of misconduct in connection with employment on February 23, 2011.

The claimant denies smoking a regular cigarette at the theatre and offers he did use an electronic (non-smoke) variety in a designated area that would be permissible. The employer did not offer the co-worker as a witness or submit a witness statement to refute claimant's testimony. The February 23 policy violation is not established.

**DECISION:**

The department decision dated April 11, 2011, reference 02, is reversed. The claimant was not discharged for a current act of misconduct on February 23, 2011. Benefits are allowed, provided the claimant is otherwise eligible.

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Randy L. Stephenson  
Administrative Law Judge

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Decision Dated and Mailed

rls/pjs