

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALAN J LEWIS
Claimant

APPEAL NO. 11A-UI-02220-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 11/28/10
Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated February 21, 2011, reference 02, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 21, 2011. The employer participated by Jim Hook, complex human resources manager. The claimant failed to respond to the hearing notice and did not participate. The record consists of the testimony of Jim Hook.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

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

The employer in this case operates a pork production plant in Waterloo, Iowa. The claimant was hired on September 8, 2009, as a full-time hourly production worker. His last day of work was December 2, 2010. He was terminated on December 2, 2010.

The incident that led to the claimant's termination occurred on November 29, 2010. The claimant was caught smoking in the locker room. Smoking is forbidden in the locker room. The claimant had been caught smoking in the locker room on November 5, 2010. He was suspended for one day and given a written warning. He was informed that if there were any more violations of the rules, he would be terminated.

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.

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 reasonable work rules. 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 that the employer prohibited smoking in its locker room. The claimant was disciplined for smoking on November 5, 2010, and suspended for one day. In the written warning that he was given on that day, he was informed that any further violation would lead to his termination. The claimant again was caught smoking in the locker room on November 29, 2010. The claimant knew this conduct was forbidden and what the consequences were if he were again to smoke in the locker room. The claimant's actions constitute insubordination, which is misconduct. Benefits are denied.

DECISION:

The representative's decision dated February 21, 2011, reference 02, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw