

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

DREW D EVANS
Claimant

APPEAL NO: 18A-UI-09261-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

A-LERT
Employer

OC: 08/05/18
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 27, 2018, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 24, 2018. The claimant participated in the hearing. Brenda Wooten, Employee Services Assistant and Leroy Cramer, Site Superintendent, participated in the hearing on behalf of the employer. Employer's Exhibits One through Five were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time millwright for A-Lert from January 15, 2018 to August 1, 2018. He was discharged after an alleged safety violation.

The employer is a non-smoking facility because the factory has several fire hazards which can be set off by smoking cigarettes or electronic cigarettes. On June 21, 2018, the employer held an employee meeting and discussed the tobacco policy (Employer's Exhibits One and Four). The employer told employees that a contractor was terminated for chewing tobacco in violation of the employer's policy (Employer's Exhibit Two). It also reiterated that e-cigarettes and/or vaping products were not allowed in the facility or parking lot (Employer's Exhibit Two and Four).

On August 1, 2018, Pipe Supervisor Kendall Bunney went to Site Superintendent Leroy Cramer and stated he observed the claimant using an electronic cigarette in the shop (Employer's Exhibit Five). Mr. Bunney confronted the claimant and he stated he was not aware smoking electronic cigarettes was against the employer's policy (Employer's Exhibit Five). Mr. Bunney showed the claimant the June 21, 2018, meeting minutes and his signature on the meeting sign-in sheet (Employer's Exhibits One, Two and Five). The employer terminated the claimant's employment for a safety violation in vaping on company property.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

While Mr. Bunney told Mr. Cramer he witnessed the claimant smoking an electronic cigarette on company property August 1, 2018, and submitted a written statement recounting the incident, he was not available to testify in the hearing. The claimant denies vaping at work and while his

testimony was not particularly credible, his first hand testimony must carry more weight than a written statement that is not subject to questioning or cross-examination.

Under these circumstances, the administrative law judge must conclude the employer has not met its burden of proving disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits must be allowed.

DECISION:

The August 27, 2018, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn