

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEITH J CIHA
Claimant

APPEAL NO: 15A-UI-06839-LDT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MIDWESTERN TRADING INC
Employer

OC: 05/17/15
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Midwestern Trading, Inc. (employer) appealed a representative's June 3, 2015, decision (reference 01) that concluded Keith J. Ciha (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was begun on July 24, 2015 and reconvened and concluded on July 31, 2015. The claimant participated in the hearing. Rick Stickle 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?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

After a prior period of employment with the employer, through a temporary employment firm, the claimant started working directly for the employer on or about September 15, 2015. He worked a maintenance assistant. His last day of work was May 4, 2015. The employer discharged him on that date. The reason asserted for the discharge was smoking in hotel rooms paid for by the employer.

The employer does not allow smoking in its premises. However, the employer had found the claimant smoking in its on-site shops two times in about February or March and had verbally warned him this was not permitted. On May 4 the employer received a bill from the motel its employees, including the claimant, had been staying at while doing work at another location; the bill included a charge for over \$300.00 for damage caused by smoking in a room. The hotel indicated that there had been someone smoking in a room the week of April 3, April 24, and May 1. The claimant acknowledged that even though the hotel was non-smoking that he had occasionally smoked in the room, so had his roommate. The employer provided second-hand

information indicating that the roommate was denying smoking in the room. The claimant acknowledged that on one occasion the on-site foreman had commented to him about smoking in the hotel room to the effect of, "Man, you can't be doing that!" However, the claimant denied that the foreman had made any indication that the employer considered the hotel rooms to be an extension of the employer's "premises" or that if he did again smoke in the room that he would be discharged.

The claimant acknowledged that after the foreman made the comment to him he had smoked in the hotel room one more time because of wanting to relax at the end of the day and because he did not take the foreman's comment to be an actual warning. While he denied that he caused all of the damage asserted by the hotel, when the employer told him about the bill, the claimant offered to simply pay the bill. However, the employer determined to discharge the claimant.

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. Rule 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. Rule 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. Rule 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 his smoking in the hotel room paid for by the employer. The employer relies exclusively on the second-hand account from foreman and the roommate to establish that the claimant had been more effectively warned and that only the claimant, not the roommate, had been smoking in the room; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether those persons might have been mistaken or whether they are credible. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to

establish by a preponderance of the evidence that the claimant had not previously been effectively warned that the employer considered the hotel rooms to be part of its “premises,” not a natural interpretation, or that if he again smoked in the room that it would in termination. In order to establish the necessary element of intent, the final incident must have occurred despite the claimant’s knowledge that the occurrence could result in the loss of his job. *Cosper, supra; Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). The claimant did not have the necessary intent to harm the employer’s interests, even if that was the effect. While the employer had a good business reason for discharging the claimant, it 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 June 3, 2015, decision (reference 01) is affirmed. 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/mak