

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARK S GRIFFITH

Claimant

APPEAL NO. 08A-UI-02939-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE UNIVERSITY OF IOWA

Employer

**OC: 02/24/08 R: 03
Claimant: Respondent (1)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated March 17, 2008, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on April 9, 2008. The parties were properly notified about the hearing. The claimant participated in the hearing. Dave Bergeon participated in the hearing on behalf of the employer with a witness, Jim Rouch.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time for the employer from September 30, 2001, to February 20, 2008. At the time his employment ended, he was a food service supervisor. He was informed and understood that under the employer's work rules, theft was grounds for immediate termination.

On January 6, 2008, the claimant took a one-ounce bag of baby carrots from the kitchen cooler and put it in his pocket. The claimant knew that the expiration date on the bag was the next day, which meant that it would have been thrown away. The claimant later ate the carrots.

At some unknown time after January 6, 2008, the security director was reviewing surveillance video and noticed the claimant taking something out of the cooler and putting it in his pocket. The security director could not tell what had been taken.

The operations manager was notified about what was observed on the security camera on February 1, but he did not review the video until February 18. The operations manager could not determine what the claimant had put in his pocket either. The claimant was interviewed by the security director and operations manager on February 20. When asked about the incident, the claimant admitted that he had taken a small bag of carrots and later had eaten. When asked if he had ever seen anyone else take things from the kitchen without paying for them, he said he had. February 20 was the first time the claimant was aware of any problem regarding

his taking anything from the kitchen. The claimant was informed that he would be informed the next day about his employment status.

The operations manager informed the claimant by telephone on February 22, 2008, that he was being terminated for theft observed on January 22, 2008. There was no other reason for the claimant's termination and he had never received any past discipline. The delay from when the tape was reviewed by the security director to when the claimant was discharged was contributed to by the operations manager being on vacation for some period of time, a delay in the operations manager viewing the video, and the bureaucracy of the employer's management.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance 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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. 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 the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established. No substantial misconduct has been proven under the facts and circumstances of this case, considering the claimant's past discipline record and that the small bag of carrots would have been discarded the next day.

Finally, the unemployment insurance rules state that the termination of employment must be based on a current act. 871 IAC 24.32(8). The Iowa Court of Appeals in Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa Ct. App. 1988) ruled that the date on which the conduct came to the employer's attention and the date that the claimant was notified about the potential discharge must be considered in deciding whether the conduct constitutes a current act. Any delay in taking action must have a reasonable basis. In this case, there was approximately a month's delay from the time that the security director viewed the video until the claimant was notified that there was a concern about him taking something on January 6, 2008. The claimant was allowed to work during this time and was unaware of the employer's concerns. The employer has not established a reasonable basis for this excessive delay in taking action. The employer argues that the delay was due to circumstances beyond the control of the operations manager. The employer, however, has not shown that the delay was due to factors outside of the employer's control. No current act of work-connected misconduct has been proven in this case.

DECISION:

The unemployment insurance decision dated March 17, 2008, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/pjs