

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

JODY K SMITH
Claimant

APPEAL NO. 17A-UI-12552-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

NATIONAL MANAGEMENT RESOURCES
Employer

OC: 11/05/17
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Jody Smith (claimant) appealed a representative's December 4, 2017, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with National Management Resources (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for December 28, 2017. The claimant participated personally. The employer participated by Brenda Garcia, Supervisor of Housekeeping.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired in August 2005, as a full-time housekeeper. The employer had a handbook but it is unknown whether the claimant received it. From the time he was hired, he told his supervisors and other employees that he had disabilities in his knees.

On May 22, 2017, the employer issued the claimant a written warning for failure to keep his area clean. The claimant worked as best he could with his disability and a lack of employees to complete all the work. On June 7, 2017, the employer issued the claimant a written warning for lack of hygiene and work ethic on May 31, 2017. On May 31, 2017, it was a hot day and the claimant was sweaty at work. The claimant showered and changed his uniform daily. The employer notified the claimant each time that further infractions could result in termination from employment.

On August 31, 2017, the claimant started working at 11:00 p.m. and was to end his shift at 7:30 a.m. on September 1, 2017. He was to have a paid fifteen-minute break at 1:00 a.m. and 5:30 a.m. He clocked out for lunch from 3:00 a.m. to 3:30 a.m. During his lunch break the claimant sat at a drawing table in the north building and drew. After this the claimant cleaned the theater. The supervisor of housekeeping told the facilities director she saw the claimant

drawing in the north building from 4:30 a.m. to 6:00 a.m. With this information, the facilities director decided to terminate the claimant.

While the claimant was cleaning in the theater, he was in pain. He called the supervisor of housekeeping and asked if he could have some of the Advil from the bottle she had provided previously. She gave him permission and told him the bottle was in the office. The claimant went to the office and found it locked. The claimant went back to work and later saw the facilities director. He asked her if he could have some Advil. She repeatedly told the claimant he could have no prescription drugs. The claimant did not understand this because Advil was not a prescription drug and the supervisor of housekeeping bought the Advil for the employees. He said, "Alright, just forget it". The supervisor told him he was fired for being insubordinate and taking an unauthorized break.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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 proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

In this case, the final incident for which the claimant was terminated was taking an alleged unauthorized break. The claimant testified that he drew during an authorized break. The employer testified he drew during an unauthorized break and more people saw the claimant but none of those people testified at the appeal hearing. Without more information, the employer did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct.

The claimant's and the employer's testimony is inconsistent. The administrative law judge finds the claimant's testimony to be more credible because his timeline of events on September 1, 2017, is believable.

The employer indicated the claimant was also terminated for insubordination. The testimony at the hearing showed that the employer made the decision to terminate prior to alleged insubordination. Therefore, this incident is irrelevant. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's December 4, 2017, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs