

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**JESSE T SMITH
715 UNIVERSITY ST
PELLA IA 50219**

**VERMEER MANUFACTURING
COMPANY INC
PO BOX 200
PELLA IA 50219-0200**

**Appeal Number: 05A-UI-02040-D
OC: 01/23/05 R: 02
Claimant: Appellant (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Jesse T. Smith (claimant) appealed a representative's February 23, 2005 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Vermeer Manufacturing Company, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on March 17, 2005. The claimant participated in the hearing and presented testimony from one other witness, Jim Smith. Chris Shepard, attorney at law, appeared on the employer's behalf and presented testimony from three witnesses, Kenny Carr, Pam Young, and Todd Atchison. During the hearing, Employer's Exhibits One through Four and Claimant's Exhibits A and B were entered into evidence. 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?

FINDINGS OF FACT:

The claimant started working for the employer on February 1, 1989. He worked full time as a material handler in the employer's agricultural and industrial equipment manufacturing business. His last day of work was January 12, 2005. The employer discharged him on January 28, 2005. The reason asserted for the discharge was violation of a short-term disability agreement.

On December 24, 2004, the claimant suffered a broken arm and was unable to return to work for a period of time. On January 3, 2005, he signed a "Work Certification STD Application for Benefits" specifying that "while receiving Short Term Disability Benefits from Vermeer, I did not perform any work (as an employee, independent contractor, sole proprietor . . .) for wage or profit . . . I further certify that I will notify Vermeer Mfg. Co. immediately upon commencing performance of any such work . . . for wage or profit . . . (Employer's Exhibit One.) The claimant drew short-term disability beginning approximately December 31, 2004, returned briefly for restricted duty work January 10, 2005, worked through January 12, then was again taken off work by his doctor. He therefore continued receiving short-term disability benefits through January 28, 2005.

The claimant had a side business as co-owner and operator of a disc jockey business, performing periodically at bars or social events. On January 22, 2005, Mr. Atchison, an area manager, observed the claimant assisting with the disc jockey equipment at a local establishment. He then reported this to the employer. When confronted, the claimant acknowledged that he had been assisting with the equipment that night. He asserted, however, that he was not acting as the disc jockey, but rather, another associate had been the disc jockey. The claimant asserted that while prior to January 1, 2005, his arrangement with the other associates who acted as disc jockeys in his business was that he split the proceeds 60/40, specifically to avoid violating the STD agreement, as of December 31, 2004, he specifically arranged that the person who acted as disc jockey would receive and keep 100 percent of the proceeds of the event. After meeting with the claimant to discuss the situation, the employer discharged the claimant for this incident, after some consideration of his past work record, on January 28, 2005.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue 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 questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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).

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is that he performed work in violation of his short-term disability agreement. However, the agreement, drafted by the employer and therefore construed in favor of the claimant, specifically indicates that the employee is not to “perform any work . . . for wage or profit.” (Emphasis added.) The employer has not presented any evidence that he received any “wage or profit” for whatever work he might have done in his personal business while under short-term disability. The claimant testified he did not receive any “wage or profit” and he presented some corroborative second-hand evidence. (Claimant’s Exhibit B.) Therefore, the claimant’s activities with his personal business were not misconduct; with those current activities not being misconduct, even if there were past acts of misconduct, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The employer 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 February 23, 2005 decision (reference 01) is reversed. 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.

ld/kjf