

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL E SANSOM

Claimant

APPEAL NO. 11A-UI-02337-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

BE & K CONSTRUCTION COMPANY

Employer

OC: 01/23/11

Claimant: Appellant (2)

Section 96.5-2-A – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated February 22, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on June 7, 2011, in Davenport, Iowa. Claimant participated. No one from the employer appeared. A prehearing conference had been held on April 26, 2011, on whether the claimant's request for an in-person hearing should be granted. The administrative law judge entered an order that the employer could participate by telephone with the exception that Scott Willington would be personally present to testify. The administrative law judge called the employer on June 7, 2011, to ask where Mr. Willington was. Cheryl Clark, Office Manager, stated that the employer did not agree with the decision to have an in-person hearing and that no one would be present. She then stated that the employer would not be participating in the hearing. The hearing proceeded without the employer's participation. The record consists of the testimony of Michael Sansom.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The employer provides maintenance and constructions services at the ADM plant located in Clinton, Iowa. The claimant was hired in 2007 as an unskilled millwright. He was a full-time employee. His last day of work was January 24, 2011. He was terminated on January 24, 2011.

The claimant was told he was being terminated for not treating his co-workers with dignity and respect. The claimant had no idea what the employer meant by this. The claimant had been suspended for three days on December 22, 2010, pending an investigation. The claimant was cleared of any wrongdoing and brought back to work. The claimant asked for his pay for the three days he had been suspended. The employer refused.

Approximately three months before his termination, the claimant had been assigned a helper who had no construction skills. The helper could not even read a tape measure. The claimant complained about this through proper channels. The claimant did not know that the helper was Scott Willington's stepson. Scott Willington was the superintendent on the site. The claimant believes that he was terminated because of his complaints about Mr. Willington's stepson.

REASONING AND CONCLUSIONS OF 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988) The employer has the burden of proof to establish misconduct.

There is no evidence of misconduct in this record. The claimant denied having done anything to cause his termination other than asking for three days of pay and complaining about his helper through proper channels. The claimant had been suspended after a complaint from another

employee. This complaint was investigated and the charges unfounded. The claimant then asked for the three days of pay he lost while being suspended. The employer refused to pay. The claimant also complained that he was not getting enough help on his job because the helper he had been assigned lacked the most basic constructions skills. The claimant spoke first to his lead man and then to his supervisor. He did not realize that the helper was the superintendent's step son. A reasonable inference from the claimant's testimony is that the employer was looking for a way to get rid of the claimant. The employer can make a business decision to terminate an employee. However, that terminated employee cannot be denied unemployment insurance benefits unless the employer establishes misconduct. The employer's failure to participate in the hearing means that there is no evidence of misconduct. Benefits are therefore allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated February 22, 2011, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css