

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICHARD L GREGORY
Claimant

APPEAL NO: 09A-UI-10233-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ARCHER-DANIELS-MIDLAND CO
Employer

OC: 06/07/09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.6-3 – Postponements

STATEMENT OF THE CASE:

Archer-Daniels-Midland Company (employer) appealed a representative's July 7, 2009 decision (reference 01) that concluded Richard L. Gregory (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 on July 21, 2009, a telephone hearing was held at 12:00 p.m. on August 4, 2009. The claimant participated in the hearing. The employer's representative received the hearing notice in advance of the hearing date. On the date of the hearing the employer's representative contacted the Appeals Section at approximately 10:00 a.m. and requested that the hearing be postponed. The administrative law judge denied the late request for postponement. Therefore, the employer did not participate in the hearing. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Should the hearing have been postponed? Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The reason for the postponement request was that the employer's witnesses were on vacation, The reason for the late request was that the employer's liaison had only informed the employer's representative of this fact on the day prior to the hearing.

The claimant started working for the employer on May 15, 1994. He worked full time as a warehouse operator. His last day of work was June 3, 2009. The employer suspended him on that date and discharged him on June 11, 2009. The reason asserted for the discharge was the conclusion the claimant had violated the employer's no tobacco product policy, as well as the state no-smoking law.

On the morning of Tuesday, June 3 the employer confronted the claimant about a package of cigarettes and a lighter the employer had found in one of the claimant's desk drawers. The claimant explained that the prior Friday, May 29, some employees of an outside contractor had used his office area while he was out attending to other duties, and that when he was preparing to leave at the end of the day, he saw the package of cigarettes and the lighter sitting on a table, so picked them up and threw them in the drawer to return to the contractor's employees later. He had then forgotten about them over the weekend, and did not remember they were in the drawer until the employer opened the drawer Tuesday morning. The employer suggested that it had also found a cigarette butt in one of the pop cans in the office. However, the brand on the butt was different from the package of cigarettes, and neither was a brand that the claimant smoked. The claimant denied he had brought in or used tobacco products in the workplace.

REASONING AND CONCLUSIONS OF LAW:

The first issue which must be addressed is whether the employer's request for postponement of the hearing effectively only two hours prior to the scheduled hearing time should have been granted. While reasonable requests for postponement can be granted, good cause must be shown, and at least absent extraordinary emergency situations, a request is to be made within three business days prior to the hearing. Iowa Code § 96.6-3; 871 IAC 26.8(2). The employer did not request the postponement within three days prior to the hearing, and the reason for the request was not shown to be of such an emergency nature as would excuse a failure to have made a timely request for a postponement. The employer's late request to postpone the hearing was properly denied.

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. 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. 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. 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 the belief he had possessed and used tobacco products in the workplace. The employer relies exclusively on the circumstantial evidence of finding the package of cigarettes and the lighter in the claimant's desk drawer; however, the claimant has given a credible explanation as to how the cigarettes and lighter came to be there and has credibly testified under oath denying responsibility for or use of the tobacco products. Under the circumstances of this case, the claimant's failure to do something else to dispose of the prohibited cigarettes more promptly was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. 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 July 7, 2009 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

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