

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SCOTT M SMITH
Claimant

APPEAL NO. 12A-UI-14662-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

LINN MAR COMMUNITY SCHOOL DISTRICT
Employer

OC: 10/28/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from the December 3, 2013 (reference 01) decision that held that the claimant was eligible for unemployment insurance benefits. After due notice was issued, a hearing was held by telephone conference call on January 31, 2013. The claimant participated personally. The employer participated by Phil Miller, the human resources generalist, and Kim Buelt, the assistant principal at the high school. The record consists of the testimony of Phil Miller; the testimony of Kim Buelt; the testimony of Scott Smith; and Employer's Exhibits 1-15.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge makes the following findings of fact:

The employer is a school district. The claimant was hired on October 1, 2010, as a special education assistant. He was a full-time employee. His last day of work was October 30, 2012. He was terminated on October 30, 2012.

The incident that led to the claimant's termination occurred on October 18, 2012. The claimant was in the classroom and was helping a student with a social studies assignment. While the claimant was helping the student, another student drew a mustache on a third student's face. The mustache resembled the mustache worn by Adolph Hitler. When the claimant looked up, he saw the drawing and laughed. The teacher sent the claimant an email saying his reaction was totally inappropriate. The claimant laughed because he had been caught off guard by the student's actions. The claimant's conduct was reported to the assistant principal, Kim Buelt.

This incident on October 18, 2012, was preceded by an incident on October 8, 2012. The claimant was approached by a student who wanted to show the claimant and another student his new bike. The claimant agreed to go outside with the two students. The two students

crouched down and managed to remove several parts from the bike, which did not belong to either of them. The employer felt that the claimant had not properly supervised the students. The claimant was approximately 15 to 18 feet away from the students and did not see what they were doing. He was attempting to get the students back in the building.

The claimant's job performance had been an ongoing concern since the time he had been hired. (Exhibit 5) On September 30, 2012, the teacher had given the claimant specific directive and expectations. (Exhibit 5) A final review had been scheduled for November 2, 2012. The employer has written policies for employee relations, appearance and conduct. Employees are required to treat coworkers, supervisor, students, public, or volunteers in a courteous, attentive and professional manner. (Exhibit 2) One of the grounds for termination can be the failure to perform required/assigned work duties and/or incompetence.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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. The legal definition of misconduct excludes errors of judgment or discretion. Unsatisfactory job performance due to incapacity or inability is not misconduct. In addition, the claimant must be discharged for a *current* act of misconduct. The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. The final incident that led to the claimant's termination was not a current act of misconduct. The incident took place on October 18, 2012, and the claimant was not terminated until October 30, 2012. During this time the claimant was permitted to work and he had no information that he was being investigated for this incident. Certainly the claimant was aware that his performance was under review but he did not know that his employer was trying to decide whether to terminate him for the incidents of October 8, 2012 and October 18, 2012. Had that information been given to the claimant or had he been suspended, then the administrative law judge could have considered whether the final incident was disqualifying misconduct. The greater weight of the evidence is that the employer took twelve days to make the discharge decision and that the claimant had no knowledge about an impending decision. In addition, he was permitted to keep working. Given these facts, the administrative law judge concludes that the claimant was not discharged for a *current* act of misconduct.

DECISION:

The decision of the representative dated December 3, 2012, reference 01, is affirmed. The claimant is eligible for unemployment insurance benefits.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css