

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NATHAN R MILLER
Claimant

APPEAL NO. 08A-UI-05267-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

BROWN CONSTRUCTION INC
Employer

OC: 04-20-08 R: 12
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 29, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 17, 2008. The claimant did participate. The employer did participate through (representative) Gary Tillman, Director of Construction and Dwight Bishop, General Superintendent.

ISSUE:

Was the claimant discharged for work-related misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a project superintendent full time beginning June 23, 2007 through April 3, 2008 when he was discharged.

The claimant was discharged because the employer was not satisfied with his job performance, including his attendance, how he completed paperwork, whether he obtained permission for design changes, how he supervised the sub-contractors, and his purchase of a Webber grill on the company account.

Regarding his attendance, the claimant asked for and obtained permission for vacation on March 20 and March 24. On March 19 the claimant was told that he could not take vacation because he was needed on the job site. The claimant had already made travel plans and he did not cancel his vacation. The claimant had been given no warnings regarding his attendance prior to his discharge.

The employer was not happy with the way the claimant completed some of the paperwork assigned to him. When the paperwork was not acceptable the employer would return it to the claimant with instructions for him to complete it or to add additional information. The claimant would then do as the employer requested. The employer never warned the claimant that his job was in jeopardy based upon how he was or was not completing paperwork.

The employer alleges that the claimant made design changes without proper authority. The claimant alleges that while some changes were made they were all done with proper consent. The claimant indicated that he is not an engineer and would have no idea how to make changes without permission from someone more knowledgeable than he. The claimant was never warned that he faced termination from employment if any unauthorized design changes were made.

The employer was dissatisfied with the way the claimant supervised some of the sub-contractors. The sub-contractors all eventually completed their duties. The employer never warned the claimant that he was not supervising the sub-contractors properly or that his failure to do so would lead to his discharge.

The claimant bought a Webber grill on the company account. He did not have permission to do so but did reimburse the company for the cost of the grill.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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.

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). The issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. The claimant was entitled to fair warning that the employer was no longer going to tolerate his performance and conduct. Without fair warning, the claimant had no way of knowing that there were changes he needed to make in order to preserve his employment.

The only conduct the claimant intentionally engaged in was his purchase of the Webber grill, which he did reimburse the employer for. This conduct was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The May 29, 2008, reference 01, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs