

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

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FBG SERVICE CORPORATION
C/O JOHNSON & ASSOCIATES
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Appeal Number: 04A-UI-04034-SWT
OC 07/20/03 R 03
Claimant: Respondent (1)

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:

The employer appealed an unemployment insurance decision dated April 1, 2004, reference 04, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on May 4, 2004. The parties were properly notified about the hearing. The claimant participated in the hearing. Alyce Smolsky participated in the hearing on behalf of the employer with witnesses. Exhibits One through Four were admitted into evidence at the hearing.

FINDINGS OF FACT:

The claimant worked full time for the employer as a cleaning specialist from August 7, 2003 to March 12, 2004. The claimant was informed and understood that under the employer's work rules, fighting insubordination, or other disruptive behavior would not be tolerated. Kristina Carver was the claimant's supervisor.

On December 29, 2003, the claimant received a verbal warning for complaining to other employees about Carver's performance as a supervisor. He was informed that he should not complain to other employees and should talk to Carver or the program manager, Jim Burchers, if he had a problem about supervision. On January 15, 2004, the claimant was suspended after he had commented to another employee about kicking another employee's ass. He was informed that he could be terminated for any further behavior inconsistent with policy.

On March 10, 2004, the claimant told another employee in a joking manner that Carver had told him to tell her that she was fired. The employee smiled and understood that it was a joke. This was later reported to Carver. Carver met with the claimant and asked him about the comment. The claimant insisted the comment was just a joke. Carver warned the claimant to keep his comments to himself. On March 11, 2003, the claimant told another employee about getting into trouble with Carver for making the "you're fired" comment to the employee.

When Carver learned that the claimant had talked to another employee about the warning he had received, she considered it insubordination because he had been told to keep his comments to himself. As a result, the claimant was discharged for insubordination on March 12, 2004.

The employer's account is not presently chargeable for benefits paid to the claimant since it is not a base period employer on the claim.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance 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.

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).

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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. The final incident involved a comment that the claimant did not intend to be taken seriously and the employee in question knew was not serious. The claimant was told to keep his comments to himself. This would reasonably mean that he should not direct any similar comments to others. His recounting of what had happened to him did not involve directing derogatory comments towards another employee. I am unconvinced that Carver told him that she did not want him telling anyone about the warning he had received.

The employer's account is not presently chargeable for benefits paid to the claimant since it is not a base period employer on the claim. If the employer becomes a base period employer in a future benefit year, its account may be chargeable for benefits paid to the claimant based on this separation from employment.

DECISION:

The unemployment insurance decision dated April 1, 2004, reference 04, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

saw/kjf