

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

LEROY ESLER
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WELLS DAIRY INC
PO BOX 1310
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Appeal Number: 06A-UI-05657-DT
OC: 04/30/06 R: 01
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
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Wells Dairy, Inc. (employer) appealed a representative's May 18, 2006 decision (reference 01) that concluded Leroy Esler (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, a telephone hearing was held on June 19, 2006. The claimant participated in the hearing. Alfredo Moreno appeared on the employer's behalf. During the hearing, Employer's Exhibit One was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on December 27, 2005. He worked full-time as a general production helper on the ice cream production line, working a 12-hour evening shift. His last day of work was May 2, 2006. The employer discharged him on May 3, 2006. The reason asserted for the discharge was falsification of documentation on his job application.

The claimant had submitted two applications for employment: On the first, completed on January 14, 2004, he responded to a question regarding criminal convictions checking "yes," that he had an "aggre. misdemeanor" in 2002; on the second, completed on May 23, 2005, he responded to essentially the same question by checking "no," and not providing any explanation. In fact, he had a conviction on June 3, 2002 for an aggravated misdemeanor of assault with intent to commit sexual abuse.

After the employer made the offer of employment to the claimant and the claimant accepted, he attended an orientation on December 27, 2005. He inquired of the human resources representative what the employer checked for on the background check, and the representative replied, "Felonies." The claimant responded by indicating to the representative that he was on the state sex offender list, but that it was not a felony conviction. The employer performed a background check on the claimant on or about January 3, 2006; however, the employer misspelled the claimant's name when it did the check, so the 2002 conviction was not discovered. On April 25, 2006, the claimant's name was in the paper as he was making a change of address and as a sexual offender, his change of address was made known to the public. The employer then reran his background check and discovered the 2002 conviction. The claimant did not remember failing to report his conviction on the second job application.

The job application specifies that "a conviction will not necessarily disqualify an applicant from employment. The recency, severity and pertinence of the conviction to the job will all be considered." The claimant's specific conviction would not have disqualified him from employment in the position into which he had in fact been hired.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue 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 questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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).

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.

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).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is the failure to disclose his criminal conviction on his job application. However, the mere fact that the claimant

failed to disclose the conviction does not end the inquiry. First, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The employer either knew or should have known of the conviction, either by virtue of the claimant's statement to the employer's representative at his December 27, 2005 job orientation, or by virtue of running a background check on January 3, 2006, either of which was several months prior to the employer's discharge of the claimant.

Further, the false statement must endanger the health, safety or morals of the applicant or others or result in exposing the employer to legal liabilities or penalties or result in placing the employer in jeopardy. The Iowa Supreme Court has ruled that a misrepresentation on a job application must be materially related to job performance to disqualify a claimant from receiving unemployment insurance benefits. Larson v. Employment Appeal Board, 474 N.W.2d 570 (Iowa 1991). Although the court did not define materiality, it cited Independent School District v. Hanson, 412 N.W.2d 320 (Minn. App. 1987), which stated that a misrepresentation is not material if a truthful answer would not have prevented the person from being hired. Here, a truthful answer would not have prevented the claimant from being hired. Therefore, the administrative law judge concludes that the claimant's act of falsification on his 2005 application was not misconduct and, as a consequence, he is not disqualified for unemployment insurance benefits. 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 May 18, 2006 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.

ld/cs