

**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**

**WAYNE WITTSTOCK  
2429 CHANEY RD  
DUBUQUE IA 52001**

**FBG SERVICE CORPORATION  
c/o JOHNSON & ASSOCIATES  
PO BOX 6007  
OMAHA NE 68106**

**Appeal Number: 04A-UI-03453-ET  
OC 02-29-04 R 04  
Claimant: Appellant (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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 23, 2004, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 19, 2004. The claimant participated in the hearing with Mike Becker, Union Steward, and Dave Winger, Union President. Tim Wittstock, the claimant's brother, acted as his representative. Al Williams, Director of Safety and Risk Management, and David Aldunate, Program Manager, participated in the hearing on behalf of the employer with Attorney Peg Heenan.

#### FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time day porter for FBG Service Corporation from January 2, 1999 to March 26, 2004. On January 23, 2004, employee Judy Heiderscheit notified Union Steward Mike Becker that the claimant hit her. Mr. Becker spoke to the claimant about the incident and the claimant admitted he "pushed" Ms. Heiderscheit. Neither the union representatives nor Ms. Heiderscheit pursued the incident further until Ms. Heiderscheit filed a grievance February 20, 2004, at which time the employer became aware of the situation. Ms. Heiderscheit told the employer the claimant grabbed and/or choked her, called her names, and threw chemical bottles at her. On February 23, 2004, the employer suspended the claimant without pay while it investigated the incident. Because there were no witnesses, the employer initially decided to transfer the claimant to a different location but when Ms. Heiderscheit learned of the plan she filed another grievance and told the employer about an incident involving the claimant in July of 2003. The employer consequently continued its investigation of that situation and determined the problem began when Ms. Heiderscheit requested the same time off that the claimant planned to ask for. The employer granted Ms. Heiderscheit's vacation request while denying the claimant's request and the claimant became very upset. When the parties exited the office after being notified of the employer's decision, Ms. Heiderscheit began to take her coat off. She had removed her right arm from her jacket and the claimant grabbed her coat by the top and back, ripped it off her, threw it on the ground and stated, "You're going to get it." Program Manager David Aldunate witnessed the incident and called the claimant into the office while he went to check on Ms. Heiderscheit, who said she was "shaken." Mr. Aldunate then tried to "calm" the claimant in the office before verbally counseling him regarding his behavior and allowing him to return to work. During the grievance procedure the claimant stated he was "helping" Ms. Heiderscheit take her coat off but he did not offer that explanation to Mr. Aldunate at the time of the occurrence. When the employer became aware of the details of the July 2003 incident, it revoked its offer of transfer to the claimant and terminated his employment. The claimant contends he complained to the employer about Ms. Heiderscheit's behavior on several occasions but they "would not listen." He could not state when he talked to the employer, however, and he did not take his complaints to the union or file a grievance regarding Ms. Heiderscheit.

#### REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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).

The employer has the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While the claimant denies any physical contact with Ms. Heiderscheit January 23, 2004, beyond accidentally bumping into her, Ms. Heiderscheit reported that he grabbed or choked her, called her names and threw empty chemical bottles at her. The claimant admitted to his union steward that he "pushed her." Although Ms. Heiderscheit initially did not want to "get the claimant in trouble," she eventually filed a grievance against the claimant because she was afraid of him and, consequently, the employer learned of the January 23, 2004 incident on February 20, 2004, when Ms. Heiderscheit filed her first grievance. The employer determined that without corroboration, it could not make a definitive finding of what actually happened between the parties and consequently, it decided to transfer the claimant to a different location. When Ms. Heiderscheit learned of the proposed transfer she filed another grievance, objecting to the transfer, and proceeded to tell the employer about the July 2003 incident. After the employer investigated that situation and determined the claimant acted aggressively in tearing Ms. Heiderscheit's coat off of her and throwing it to the ground, it concluded the claimant's actions violated the employer's policy prohibiting violence in the workplace. While the union representatives described the claimant as "laid back" and "good natured," the fact remains that at the very least, the claimant pushed Ms. Heiderscheit January 23, 2004. The claimant's explanation that he was "helping" her take her coat off in July 2003, even though he was angry with her at the time, was not credible. The claimant's assault of Ms. Heiderscheit January 23, 2004, was not an isolated incident and his conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. Consequently, the administrative law judge concludes the employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

DECISION:

The March 23, 2004, reference 01, decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

je/b