

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GORDON A JOHNSON
Claimant

APPEAL NO: 10A-UI-07814-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DEXTER FOUNDRY INC
Employer

OC: 12/20/09
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Gordon A. Johnson (claimant) appealed a representative's May 20, 2010 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Dexter Foundry, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 15, 2010. The claimant participated in the hearing and presented testimony from one other witness, Leroy Haynes. Greg Hanshaw appeared on the employer's behalf. 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 September 7, 1999. After recall from a layoff in July 2009, the claimant began working full time as a millroom grinder, working on the third shift. His last day of work was April 23, 2010. The employer discharged him on that date. The reason asserted for the discharge was continued unsatisfactory job performance after progressive discipline.

From July 2009 until February 2010, the claimant had not been doing jobs that were subject to piece work rates. In February 2010, he was informed that he would need to begin doing that work and meeting those standards. Virtually immediately, he began receiving disciplinary action for failing to meet even a minimal percentage of the standard, with his first verbal warning being given to him on February 10. The work performance was measured essentially each week, and the claimant was subsequently given additional verbal warnings and then written warnings as he continued to failure to meet the standards. On March 19 he was given a three-day suspension for continued failure to meet the standards. Finally, he was discharged on April 23 for the continued failure to meet the standards.

The claimant's work product output was consistently less than 50 percent of the standard. The employer suggested that part of this could have been due to "standing around," but the claimant denied this, supported by other first-hand testimony from Mr. Haynes, third shift union representative and also a laborer in the claimant's vicinity on the third shift. The claimant suffers from some serious health issues, at least including severe diabetes; he asserted and the employer did not controvert that this had at least some effect on his job performance. There was no evidence that the claimant had ever been able to perform the job requirements to meet the employer's productivity standards, and that therefore in failure to meet those standards in the spring of 2010 was due to his not working to the best of his abilities.

REASONING AND CONCLUSIONS OF LAW:

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). The question 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 matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is his failure to work to the employer's job expectations after prior disciplinary warnings. Misconduct connotes volition. The mere fact that an employee might have various incidents of unsatisfactory job performance does not establish the necessary element of intent. Huntoon, supra; Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). Where there is no evidence the claimant had otherwise been able to meet the employer's job expectations and had subsequently effectively chosen not to do so, there is not misconduct; where an employee is discharged due to a failure in job performance, the employer must provide proof of that employee's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. Kelly v. IDJS, 386 N.W.2d 552 (Iowa App. 1986); Sellers v. Employment Appeal Board, 531 N.W.2d 645 (Iowa App. 1995). To do so is to impermissibly shift the burden of proof to the claimant. Kelly, supra.

The employer has not established that the claimant's failure in job performance or failure to improve after progressive discipline was intentional despite being able to meet those performance standards. A discharge because of being physically unable to do the work, being not capable of doing the work assigned, or not meeting the employer's standards is not misconduct, even if the employer had a good business reason for discharging the claimant due to that lack of satisfactory job performance. 871 IAC 24.32(5). 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 20, 2010 decision (reference 01) is reversed. 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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