

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TOMMY L MANN**  
Claimant

**APPEAL NO. 13A-UI-01006-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ROBERT J WELLS**  
**WELCO INDUSTRIES**  
Employer

**OC: 12/16/12**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge  
Section 96.6-2 – Timeliness of Appeal

**STATEMENT OF THE CASE:**

Welco Industries filed an appeal from a representative's decision dated January 14, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on February 27, 2013. Although duly notified, the claimant did not participate. The employer participated by Ms. Annette Wells, Co-Owner.

**ISSUES:**

The issues are whether the employer's appeal was timely and whether the claimant was discharged for intentional misconduct in connection with his work.

**FINDINGS OF FACT:**

Having considered all of the evidence in the record, the administrative law judge finds: The employer's appeal is timely in this matter. The appeal was delayed by action of the U.S. Postal Service and was not due to any delay on the part of the employer.

Tommy Mann was employed by Welco Industries from July 23, 2012 until November 28, 2012 when he was discharged for failing to perform his work in a satisfactory manner. Mr. Mann was employed as a full-time laborer for the construction company and was paid by the hour. His immediate supervisor was Mr. Robert Wells.

The employer made a management decision to discharge Mr. Mann from his employment with the company on November 28, 2012 when the employer concluded that Mr. Mann lacked the initiative or abilities to work at the level of competence expected by the employer and its clients. Mr. Mann had been warned in the past about failing to perform routine tasks to the employer's expectations. The employer had concluded that Mr. Mann did not have the ability to learn the job, recall instructions or perform at the level of competency that the company needed.

When Mr. Mann reported to work on November 28, 2012, in a lethargic condition, the employer concluded that continuing to employ Mr. Mann would not be worthwhile and separated the claimant from employment at that time.

### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes intentional misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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.

The employer has the burden of proof in establishing job disqualifying 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 the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants the denial unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not always serious enough to warrant a denial of unemployment insurance benefits. Such misconduct must be "substantial." When based upon 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 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, the employer incurs potential liability for unemployment insurance benefits related to that separation.

Inasmuch as the evidence in the record establishes that the claimant's poor performance and inefficiency were the result of inability or incapacity, the administrative law judge concludes the claimant was not discharged for intentional misconduct sufficient to warrant the denial of unemployment insurance benefits. Benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

**DECISION:**

The representative's decision dated January 14, 2013, reference 01, is affirmed. Claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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