

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ENOCH HIGBEE

Claimant

APPEAL NO: 09A-UI-03458-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

BURKE MARKETING CORPORATION

Employer

OC: 02-01-09

Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the February 23, 2009, 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 March 30, 2009. The claimant participated in the hearing. Shelly Seibert, Human Resources Generalist, participated in the hearing on behalf of the employer. Employer's Exhibits One and Two were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

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 supervisor in training for a position as maintenance supervisor for Burke Marketing from December 26, 2007 to January 29, 2009. He was discharged after an employee reported the claimant participated in, and allowed the employees he was supervising, to play cards and use the company computer to play games. The claimant testified that did occur prior to the time he was made a supervisor in training and he reported the situation to his supervisor but no action was taken in response to his notification. He also testified that he did play cards with other employees or played card games on the computer in his office but only during breaks. The employer suspended the claimant and other employees involved January 24, 2009, and terminated the claimant's employment January 29, 2009. The claimant had not received any previous warnings for incidents of this nature but received a verbal warning in 2007 for not thoroughly completing preventative maintenance on machines and on January 10, 2008, for failing to follow good manufacturing standards.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 proving disqualifying misconduct. 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). The claimant credibly testified that the card playing and use of the company computer for game playing only occurred during break times during the time he was a supervisor in training. The employer was also credible but was not a first-hand witness as was the claimant and his first-hand testimony must carry more weight than that of a second-hand witness. While the claimant probably should have been more vigilant in making sure neither he nor his employees were breaking any of the employer's rules or were in violation of its policies and procedures, the administrative law judge cannot conclude that the claimant's actions rise to the level of disqualifying job misconduct as defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The February 23, 2009, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css