**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**PETER MCWHERTER**
Claimant

**M H EBY INC**
Employer

**APPEAL NO: 07A-UI-06809-ET**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 06-03-07 R: 02**
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the July 2, 2007, 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 July 24, 2007. The claimant participated in the hearing with Legal Intern Jill Oleson. Adam Anderson, Plant Manager and Stacey Varley, Human Resources, participated in the hearing on behalf of the employer. Claimant's Exhibits A and B 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 fabricator I for M H Eby from July 10, 2006 to June 1, 2007. He was discharged for an accumulation of eight disciplinary actions during his tenure with the employer. On November 1, 2006, he received a written warning and one-day suspension after the employer found a company-owned drill hidden in his locker during a random search. The employer decided to give him the benefit of the doubt and determined the incident was an act of making company owned tools unavailable to company employees rather than an act of theft. On November 20, 2006, the claimant received a verbal warning for attendance for earning 5.50 attendance points. On December 20, 2006, he received a written warning for a safety violation for failure to wear gloves when using a grinder. On January 23, 2007, he received a written warning for substandard work for failure to properly prime before painting after the employer previously talked to him about the issue. On February 1, 2007, he received a written warning after accumulating six attendance points. On February 15, 2007, he received a written warning for horseplay for throwing tape balls and a written warning for attendance for gaining his seventh attendance point. On May 4, 2007, he received a written warning and three-day suspension for accumulating his eighth attendance point and was placed on a last chance agreement for various behavioral disciplinary actions. On June 1, 2007, he was discharged for spreading gossip and untruths about co-workers. The claimant testified that on May 29, 2007, two employees told him they were taking June 1, 2007, off to apply for a

different job. On June 1, 2007, there was talk on the shop floor about the situation, which the claimant testified he did not participate in. He testified Supervisor Jimmy Bohl approached him about the incident and the claimant told him what was going on after Mr. Bohl said it would be difficult to replace those employees and because he was afraid the other two employees would leave and he would be "stuck" doing twice as much work. The claimant denies that he participated in any other discussions on the floor about the other two employees leaving. Later that day the employer terminated his employment for the accumulation of disciplinary actions and spreading gossip and untruths about co-workers. Both employees denied to the employer that they took the day off to seek other employment.

**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 did have several disciplinary actions from attendance violations, to performance, to horseplay, in the nearly 11 months he worked for this employer. While the employer's frustration with the claimant is understandable, the last incident, which was the proverbial last straw, is problematic in that the claimant testified he did not participate in the shop discussion about the two employees' absence to look for other positions but was approached by Mr. Bohl. Although the administrative law judge did not find the claimant's testimony particularly credible, the employer did not provide the first-hand testimony of other shop employees or Mr. Bohl and therefore the claimant's first-hand testimony must be given more weight. If that situation is eliminated because of ambiguity, the employer is lacking a current act of misconduct causing the discharge. Consequently, while acknowledging the claimant had several disciplinary actions, and not condoning his behavior, the administrative law judge must conclude that the employer discharged the claimant for no current act of disqualifying misconduct and benefits must be allowed.

**DECISION:**

The July 2, 2007, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/pjs