

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALAN W HUPP

Claimant

APPEAL NO. 07A-UI-10889-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CON AGRA - COUNCIL BLUFFS

Employer

**OC: 10/28/07 R: 01
Claimant: Respondent (1)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated November 15, 2007, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on December 13, 2007. The parties were properly notified about the hearing. The claimant participated in the hearing with a witness, Mike Jens. Joanne Peterson participated in the hearing on behalf of the employer.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time for the employer as a forklift operator from September 20, 2004, to October 26, 2007. The claimant was informed and understood that under the employer's work rules, employees were prohibited from threatening, intimidating, coercing, harassing (sexual or otherwise), interfering with, or abusive behavior toward employees. Employees were also prohibited from contributing to a hostile work environment. He had received a suspension on September 26, 2007, when he was caught with gum in his mouth in the plant, in violation of a company work rule.

On October 24, 2007, the claimant was having a conversation with coworkers. The coworkers asked the claimant what he thought about Mexicans working in the plant. The claimant said that it was fine, and he had no problem with that. A coworker responded that he didn't care if they were "living up here." The claimant responded that he didn't care either. He then added as a joke that "maybe we should send the lazy ones back." The coworkers laughed, and nothing more was said. Afterward, some unknown employee reported the comment to management. The claimant also had an African-American coworker, Frank, that he sometimes called his "soul brother." The claimant was in the Vietnam War, where the term "soul brother" was commonly used. He had a friendly relationship with Frank and had explained why he used the term. He asked Frank if he had a problem with the expression. Frank told him that he did not have a problem with it. Someone also reported to management that the claimant had used the term

“soul brother” when referring to the employee. The claimant did not intend to offend anyone with his comments.

On October 26, 2007, the employer discharged the claimant for violating the policy against harassing behavior and creating a hostile work environment.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. 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).

No willful and substantial misconduct has been proven in this case. It appears that the employees were goading the claimant into making an inappropriate comment. The claimant's response that he had no problem working with or living with individuals from Mexico was an appropriate response. His somewhat feeble joke was inappropriate but falls short of harassing conduct or behavior creating a hostile work environment. Likewise, the claimant intended no ill will with his comment to Frank and had spoken to him to make sure it was okay. He made a good-faith error in judgment because he had not considered the possible effect on other workers who may have not have been aware he and Frank had an understanding about the expression.

DECISION:

The unemployment insurance decision dated November 15, 2007, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/kjw