

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ARNOLD D LUSK**  
Claimant

**APPEAL NO: 18A-UI-08255-TN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DIVINE ENGINEERING INC**  
Employer

**OC: 07/15/18**  
**Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

Arnold D. Lusk, the claimant, filed a timely appeal from a representative's unemployment insurance decision dated July 31, 2018, (reference 01) which denied benefits, finding that the claimant was discharged from work on July 16, 2018 for conduct not in the best interest of the employer. After due notice was provided, a telephone hearing was held on August 23, 2018. Claimant participated. The employer participated by witnesses Mr. William Colling, Mr. Mike Pettijohn, Mr. Keith Kjosa, Mr. Clint Wheeler and Mr. James Weiderhold. Claimant's Exhibit 1 was admitted into the hearing record.

**ISSUE:**

The issue is whether the claimant was discharged for work-connected misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered all of the evidence in the record, the administrative law judge finds: Arnold D. Lusk was employed by Divine Engineering, Inc. from November, 2011 until July 16, 2018 when he was discharged by the employer. Mr. Lusk most recently worked as a full-time shipping/receiving worker and also did custodial work. The claimant was paid by the hour. His immediate supervisor was Mr. James Wiederhold.

Mr. Lusk was discharged on July 16, 2018 for an incident that took place at work on July 13, 2018. On that day, Mr. Lusk reported to work, removed his name from his locker, emptied his contents, and told one or more employees that he intended to quit that day.

At approximately 7:30 a.m., an employee informed Mr. Wiederhold, the superintendent, that altercations took place between Mr. Lusk and Mr. Pettijohn, another employee. The superintendent went to the area and observed Mr. Lusk yelling at Mr. Pettijohn. Although Mr. Lusk appeared to be the aggressor, the superintendent sent both employees home pending an investigation. Both Mr. Lusk and Mr. Pettijohn had been specifically warned the day before about arguing on the job and warned that further conduct of that nature could result in both employees being discharged.

A number of company employees present that day were interviewed by the employer, and indicated that Mr. Lusk was the aggressor. Although the claimant blamed Mr. Pettijohn for the incident, a decision was made to terminate Mr. Lusk, but not Mr. Pettijohn, because the weight of evidence established that Mr. Lusk was the aggressor in the confrontation and Mr. Pettijohn was not.

Mr. Lusk was terminated by telephone, at which time the employer cited the claimant's poor attendance as well as the incident on July 13, 2018 as the reasons for the discharge. Although the employer was dissatisfied with Mr. Lusk's attendance, he would not have been discharged, but for his conduct on July 13, 2018, in violation of his specific warning given to him the proceeding day.

It is Mr. Lusk's position that Mr. Pettijohn was the aggressor that Mr. Lusk was not. It is claimant's further position that some employees had engaged in on-going harassment of him, but the company had taken no action. It is the claimant's position that Mr. Pettijohn had threatened him with bodily injury and that he had only raised his voice in an attempt to get Mr. Pettijohn to stop. It is the claimant's belief that both he and Mr. Pettijohn should have been discharged from employment because the employer had threatened to discharge both of employees if they had any additional altercations at work.

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

The question before the administrative law judge is whether the evidence in the record establishes work-connected misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does. Benefits are denied.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

In discharge cases, the employer has the burden to prove job connected misconduct. See Iowa Code § 96.6(2). The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In the case at hand, Mr. Lusk was discharged after he was involved in a verbal altercation with Mike Pettijohn on July 13, 2018. Both the claimant and Mr. Pettijohn had been specifically warned the day before that engaging in that type of behavior could result in the loss of employment.

Although the administrative law judge is aware of Mr. Lusk's position that the other employee was the aggressor, the preponderance of evidence in the record is established in favor of the employer. The employer's witnesses testified that Mr. Lusk expressed dissatisfaction with his employment and stated to other employees he was quitting that day. The employer's witnesses also confirmed that Mr. Lusk was the aggressor and not the other employee.

Although the employer cited attendance in addition to the final incident as reasons for Mr. Lusk's discharge, his discharge on July 16, 2018 was caused by his conduct during the altercation on July 13, 2018. If the employer was dissatisfied with the claimant's attendance, he may not have been discharged at that time for his attendance. His discharge was triggered by Mr. Lusk's aggressive behavior after being specifically warned the proceeding day.

The employer sustained its burden of proof in establishing disqualifying work-related misconduct. The claimant is disqualified for unemployment insurance benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

**DECISION:**

The representative's unemployment insurance decision dated July 31, 2018, reference 01, is affirmed. Claimant was discharged for work-connected misconduct. Unemployment insurance benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

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Terry P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

tn/scn