

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JACOB E STOKER

Claimant

APPEAL NO: 12A-UI-15016-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DSM HEALTHCARE MANAGEMENT

Employer

OC: 10/07/12

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Jacob E. Stoker (claimant) appealed a representative's December 18, 2012 decision (reference 04) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with DSM Healthcare Management (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 18, 2013. The claimant participated in the hearing. Mike Jarrell appeared on the employer's behalf and presented testimony from one other witness, Danielle Wilson. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on October 11, 2012. He worked full-time first as a cook, and as of about November 1, as a dishwasher/dietary aide. His last day of work was November 25, 2012. The employer discharged him on that date. The reason asserted for the discharge was having unsanitary work habits.

The claimant has a diagnosed medical condition under which he compulsively touches his hand to his mouth. He agreed to and did wear a face mask, but occasionally saliva did seep through the face mask from where the claimant was touching his hand to the face mask covering his mouth. The employer switched the claimant from the cook position to the dishwasher/dietary aide position due to the concern about him touching his hand to his mouth and then touching food. After November 1 the claimant rarely if ever did anything but wash dishes and therefore did not have contact with food being prepared for consumption. However, the employer

continued to have concern about the possibility of the claimant touching food, and determined to discharge him.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is his compulsion to touch his hand to his mouth which gave the employer concerns as the possible unsanitary complications. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra. There is no evidence the claimant intentionally did anything to jeopardize his job. While the employer might have had a good business reason to discharge the claimant, it has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's December 18, 2012 decision (reference 04) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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