

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RANDOLPH D ZOOK
Claimant

APPEAL NO. 11A-UI-09433-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

BERTCH CABINET MFG INC
Employer

**OC: 01/30/11
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct

STATEMENT OF THE CASE:

The employer appealed a department decision dated July 11, 2011, reference 01, that held the claimant was not discharged for misconduct on June 6, 2011, and which allowed benefits. A telephone hearing was held on August 9, 2011. The claimant participated. Mitzi Tann, HR director; Cory Bengston, shift leader; and Tracy Bertch, production manager, participated for the employer. Employer Exhibits 1 was received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered the evidence in the record, finds: The claimant was re-hired by the employer on January 25, 2011, and last worked for the employer as a full-time finisher/UV line apprentice on June 6. He received the employer policies in an employee handbook. The policy states any associate can be terminated for theft of property from a co-worker.

On May 31, Shift Leader Bengston could not find a 20-ounce Mountain Dew bottle he had placed in an employer-provided refrigerator, and he went about the plant looking for it. He had made some black marks on the back of the bottle so he could identify it. He located a Mountain Dew bottle in claimant's work area and confronted him. Claimant stated it was his. When Bengston showed claimant the bottle with the black marks, claimant admitted it was not his. The incident was reported to Production Manager Bertch.

About two weeks before the May 31 incident, Bertch had a meeting with employees to warn them about an issue with food being taken from employee lunch boxes that did not belong to them. Claimant was sent home pending a review.

On June 6, the employer decided to terminate claimant for violation of theft of property from a co-worker. HR Director Tann acknowledged in the hearing that the management decision was

a surprise to her but one she accepted. Bertch stated in the hearing that claimant had previous attendance issues and had failed to give adequate notice when leaving employment prior to re-hire. He concluded that claimant had committed a blatant action by taking a pop that did not belong to him, which became an issue to whether he could be trusted in the future.

Claimant stated he had placed a similar pop in the refrigerator before May 31 and he thought the one he took was his. He failed to offer the explanation, because he thought he would serve the suspension and he would be returned to employment.

REASONING AND CONCLUSIONS OF 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 administrative law judge concludes the employer has failed to establish that the claimant was discharged for misconduct in connection with employment on June 6, 2011.

The employer did establish claimant took a bottle of pop from an employer-provided refrigerator for employee use that did not belong to him. The employee common use of the refrigerator makes it a difficult venue to control as to what belongs to whom, and there is an inherent element of risk in this setting that negates the employer's contention that claimant deliberately stole from a co-worker. Claimant admits he took the bottle that he thought was his rather than property of a co-worker, and the identification with black marks on the reverse side is not something that would be readily visible, which negates the element of intent. The fact that the

employer decision makers were influenced to discharge claimant by some pre-hire conduct further negates the element of an intentional act relied upon for discharge. The policy does not state that theft of property will result in termination, but can be.

DECISION:

The department decision dated July 11, 2011, reference 01, is affirmed. The claimant was not discharged for misconduct on June 6, 2011. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw