

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JAMES P GRIEBEL
1462 YANKEE AVE
NEW LIBERTY IA 52765

CONTINENTAL CEMENT COMPANY LLC
10107 HWY 79
HANNIBAL MO 63401

Appeal Number: 05A-UI-05129-DT
OC: 04/10/05 R: 04
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

James P. Griebel (claimant) appealed a representative's May 3, 2005 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Continental Cement Company, L.L.C. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 2, 2005. The claimant participated in the hearing. Richard Huss appeared on the employer's behalf and presented testimony from one other witness, Dan Lefever. 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?

FINDINGS OF FACT:

The claimant started working for the employer on or about May 1, 1995. He worked full time as a terminal utility man at the employer's Bettendorf, Iowa terminal of its wholesale cement distribution business. His last day of work was April 12, 2005. The employer discharged him on that date. The reason asserted for the discharge was an accumulation of miscellaneous prior concerns with a final issue relating to the making of personal long distance telephone calls.

On April 11, 2005, the terminal manager, Mr. Lefever, received a copy of the terminal's phone bill for mid-March through early April. The phone bill normally went to the employer's home office in Hannibal, Missouri, but by chance had gone to Mr. Lefever on this occasion. The bill revealed that during that time, the claimant had made approximately 30 long distance calls to his home ranging from one to fifteen minutes at an estimated cost of \$30.00. Mr. Lefever confronted the claimant with the bill on April 12, 2005, who acknowledged that he had made the calls, as he had been doing for his entire period of employment. The employer had not previously noted the calls, and had not addressed the issue of calls from the terminal to his home in the past. There was not a specific policy or rule provided that specifically addressed the issue of personal calls or personal long-distance calls, and the claimant had not been previously advised that he could not make personal or personal long-distance calls on the employer's phone system. He had been given a warning February 22, 2002 regarding long distance calls on the employer's account on a business trip, but the issue then was not that they were personal calls, but that they had been excessive.

Other issues that led Mr. Lefever to take the step of discharge upon learning of the long-distance calls included a concern that on April 4, 2005 the claimant had provided too much internal information to a customer regarding the type of cement the customer was getting; however, the claimant only told the customer that the customer was getting "type I" cement, which is what the customer was supposed to get; the claimant did not supply any other information to the customer regarding the type of cement. There had been prior issues addressed in performance reviews in 2002 and 2004; however, the claimant had not had an absence since December 2004. On February 3, 2003 the claimant was counseled with regard to getting along with a coworker, but there had been no further documented issues. On September 18, 2001 the claimant had been given probation due to disrespect and insubordination due to an incident with Mr. Lefever, as well as an attendance issue, but the claimant had successfully completed the probation and there were no further documented issues regarding respect.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue 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 questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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).

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or

- b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is reversed. Misconduct connotes volition. Huntoon, supra. There is no evidence the claimant intentionally made the personal long-distance calls knowing it was not allowed; rather, given the employer's failure to address the issue in the past, the fact that the only relevant discipline on the issue in the past inferred that there could be personal long-distance calls covered by the employer so long as they were not excessive, and the claimant's belief that the employer and even Mr. Lefever were aware of his practice, the claimant believed in good faith that his calls were not prohibited. Under the circumstances of this case, the claimant's making of the phone calls was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion.

Since the making of the phone calls do not constitute misconduct, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The employer 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 May 3, 2005 decision (reference 01) 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.

ld/pjs