

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN D FREELAND
Claimant

APPEAL NO. 10A-UI-09303-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ARC MANAGEMENT SERVICES LLC
Employer

OC: 04/25/10
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 16, 2010 (reference 02) decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on August 16, 2010. Claimant participated. Employer participated through human resources generalist Jenny Sherman and supervisor Toni Powers and was represented by Susan Schneider, Attorney at Law. Employer's Exhibits 1 through 4 were admitted to the record.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as a maintenance worker from March 16, 2010 and was separated from employment on April 23, 2010. Powers saw him carrying a non-operating weed trimmer without wearing his safety glasses on April 22, 2010. He wears prescription glasses and had worn safety glasses over those while trimming a portion of the property earlier. He took off the safety glasses while walking to the next area to trim. He had never used the weed trimmer before but had been warned verbally about wearing earplugs on the lawn mower on April 14, 2010. He had worn the ear plugs while mowing and stopped to talk to another employee so took them out. He had them in his pocket and intended to put them back in again before resuming mowing. On April 4 he drove the company truck while talking on a company cell phone in violation of company policy and ran a stop sign. He believed he was required to answer the phone when Powers called regardless of location but acknowledged he could have found a place to pull over before answering. He went through online safety training for about two hours that covers protective equipment the maintenance staff must wear. He also completed monthly safety training.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a

“wrongful intent” to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. While answering the cell phone while driving was careless, it was not illegal and in spite of employer’s policy, claimant believed he was to answer Powers’ phone calls at all times while carrying the company cell phone. Claimant did wear the earplugs while mowing but took them out only to speak to another employee when the engine was running but the mower was not. However, these were not the final or current acts of alleged misconduct. The conduct for which claimant was discharged has not been established to be misconduct as claimant was wearing safety glasses while the weed trimmer was being operated but was not while moving to another area when the trimmer was not operational. Since claimant did not operate the equipment without wearing the safety equipment, no misconduct has been established. Benefits are allowed.

DECISION:

The June 16, 2010 (reference 02) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs