

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LAWRENCE PHILLIPS

Claimant

APPEAL NO: 13A-UI-00579-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FBG SERVICE CORPORATION

Employer

OC: 12/02/12

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Lawrence Phillips (claimant) appealed an unemployment insurance decision dated January 14, 2013, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from FBG Service Corporation (employer) without good cause attributable to the 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. The employer participated through Michael Oliver, Custodial Supervisor; Lindsey Nissen, Facilities Director; and Alyce Smolsky, Employer Representative. Employer's Exhibit One was admitted into evidence. 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:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a part-time cleaning specialist from May 28, 2009 through December 5, 2012 when he was discharged for poor work performance. The employer repeatedly warned the claimant that he was not completing his job duties even though he was more than capable of doing so. When his performance did not improve, he received a formal written warning on May 26, 2011. The warning advised him that he had to dust mop and wet mop under chairs.

The claimant continued to neglect the mopping and a written warning was issued on February 17, 2012. He was suspended for three days on August 7, 2012 for not maintaining a good quality of work and not cleaning several areas. The suspension was a final warning and he was advised his job was in jeopardy if he failed to correct the problem.

The claimant was discharged after he continued to disregard the employer's directives. The trash and dust bunnies were not removed from the hallway floors and from behind the doors. The claimant did not sweep and mop the hallways as required and failed to manually clean the areas which were not hit by the scrubber.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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.

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 employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on December 5, 2012 for poor work performance and a repeated failure to follow the employer's directives. When an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Department of Job Service*, 386 N.W.2d 552 (Iowa App. 1986). The evidence confirms the claimant was more than capable of performing his job duties and meeting the expected standards.

The claimant's poor job performance was not due to inability or incapacity nor can it be deemed simple negligence in an isolated situation. He regularly and repeatedly ignored the employer's directives. Repeated failure to follow an employer's instructions in the performance of duties is misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated January 14, 2013, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs