

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GARY W SCHWEBACH
Claimant

APPEAL NO. 07A-UI-05052-SW

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS DAIRY INC
Employer

OC: 04/22/07 R: 01
Claimant: Appellant (2)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated May 8, 2007, reference 01, that concluded he was discharged for work-connected misconduct. A hearing was held on September 10, 2007. The parties were properly notified about the hearing. The claimant participated in the hearing with his representative, Dennis McElwain. Alyce Smolsky participated in the hearing on behalf of the employer with witnesses, Alfredo Moreno and Christine Comstock. Exhibits One through Four were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time for the employer from January 28, 1990, to April 20, 2007. During the last eight to nine years, the claimant worked as a clean-in-place (CIP) operator. The job involved cleaning the ice cream making lines machines after the operators had completed their work. The claimant was suspended in February 2006 for failing to lock out the power on a machine before working on it in violation of a work rule.

On January 23, 2007, the claimant got into an argument with a machine operator, Wendell Krause, which had to do with the claimant starting the cleaning on a machine without Krause's okay. Both parties were yelling during the incident. The claimant was not disciplined about the matter. Instead, the employer established a written procedure that was posted in the plant that stated. "When going to a machine to start CIP/Parts. If you are not sure if they are done running. Ask only the operator of that line if you can start CIP hookup's/parts/sanitation. If the operator gives you the ok then go ahead with your job. If they say no then please wait till they are done."

On April 3, the claimant was talking to a member of the employee committee, Joel Epling, in the break room after work. They were to meet with management about a grievance, and the claimant was concerned that Epling was going to give in to management on the grievance. When he expressed this to Epling, they argued and each used profanity towards the other party.

Ultimately, they agreed to a strategy and the claimant later complimented Epling on his efforts. Epling did not complain to management about the claimant, but someone else who overheard the argument reported that the claimant was yelling and swearing at Epling. This issue was not discussed with the claimant until he was suspended on April 18.

On April 16, Krause's wife who also works at the plant had bumped into the claimant's cleaning cart, which cause some water to splash on the floor. The claimant retorted, "Holy shit." The employee complained to management that she did not appreciate the way the claimant talked to her and reported that when she moved the cart, he had snapped, "Don't be moving my shit."

On April 17, the claimant approached the machine that Krause was working on. He saw Krause working on the paperwork for the run, which would indicate that he was finished with the machine. The claimant saw the assistant shut off the freezer and pump, which is done when production ends. The claimant believed that production was done but asked whether the lines were done. He asked the question generally, and both the assistant and Krause could have heard him. Krause said nothing. The assistant replied yes. The claimant proceeded to clean the equipment because the line was in fact done. Krause reported to management that the claimant had not received his okay before he started cleaning the equipment.

On April 18, the claimant was suspended and on April 20, 2007, he was discharged for insubordination, harassment, and unsatisfactory work performance as a result of his conduct on January 23, April 3, April 17, and April 18.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance 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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. The claimant testified credibly about the events on January 23, April 3, April 17 and April 18 and his firsthand evidence outweighs the employer's hearsay evidence to the contrary. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established. During the final incident, no willful and substantial misconduct has been proven in this case. The policy only requires the CIP operators to get the operators okay, "If you are not sure they are done." The claimant reasonably believed that the run was completed. While he did not directly ask Krause, Krause could have responded if the run was not actually done.

The April 3 incident involves an argument about a grievance strategy in which both parties became heated and used profanity. While I am not condoning this foul-mouth argument even if the parties were off duty since they were on the employer's property, this does not amount to willful and substantial misconduct. Finally, the off-color comment to the employee who bumped into his cart does not amount to willful and substantial misconduct; it was a temper flare up at most, rather than harassment.

DECISION:

The unemployment insurance decision dated May 8, 2007, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/pjs