

**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**

**JOAQUIN A PEREZ  
2401 HWY 6 E APT 2207  
IOWA CITY IA 52240-6712**

**FBG SERVICE CORPORATION  
c/o JOHNSON & ASSOCIATES  
PO BOX 6007  
OMAHA NE 68106-6007**

**Appeal Number: 06A-UI-06387-LT  
OC: 05-14-06 R: 03  
Claimant: Respondent (1)**

**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)

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

STATEMENT OF THE CASE:

Employer filed a timely appeal from the June 13, 2006, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on July 13, 2006. Claimant participated through interpreter Giovy Carnet. Employer participated through Bob Fultz and Malaphone Sourivong. The issue is whether claimant was discharged for reasons related to job misconduct. Employer's Exhibits 1 and 2 were received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time cleaning specialist from October 14, 2002 through May 15, 2006, when he was discharged. On May 12 customer Pierson NCS, corporate owner of three buildings where claimant was assigned to work on a rotating basis of two hours at a time, could

not find claimant at 2:30 p.m. to clean a mess in the cafeteria. He was at building number 2450 at 2:30 p.m. on May 12 and had his radio with him and no one called him. He rotated among three buildings numbered 2400, 2450 and 2470. The latter two numbers share a building but have separate entrances. He returned to the building about 3:00 p.m. but saw no one. He worked in the building at 2470 and clocked out at 4:30 p.m. He followed the same rotation for working in the buildings.

On February 23, the subject date of the March 1, 2006 warning, claimant began work at 5:00 p.m., not at 2:30 p.m. or earlier as employer claimed. (Employer's Exhibit 2, page 2) Supervisor Nora Winchester claimed she was at claimant's assigned building about 7 p.m. and could not enter because she did not have a key card or badge. Winchester did not participate in the hearing. Claimant was working elsewhere in the building and left at 9:30 p.m. to take his lunch for 15 minutes at McDonald's near the building and while he was on break Winchester returned to the building. He was not absent from the worksite for two hours as alleged and at 9:45 p.m., he left to work in another building. There had been some problems with phones since the buildings were new and some did not have phones, so he called from the TM One building, where he also worked. He reported to his immediate supervisor, Sourivong, at the beginning of each shift.

#### 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 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 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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

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. Since employer did not attempt to reach claimant on his radio on May 12 and claimant regularly rotates between three buildings, employer has not met the burden of proof to establish that claimant was not working when he should have been. Employer's allegations as to the earlier event are not credible as they do not conform to the time records presented. Benefits are allowed.

#### DECISION:

The June 13, 2006, reference 02, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

dml/kkf