IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JEREMY P MCMAHON
Claimant

ALLEN BLASTING AND COATING INC
Employer

APPEAL NO. 09A-UI-00006-H2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11-02-08 R: 03
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the December 23, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 14, 2009. The claimant did participate. The employer did participate through Joyce Stimpson, Human Resources and Safety Director. Employer's Exhibit One was received. Employer's Exhibit One was received.

ISSUE:

Was the claimant discharged for work-related misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as an apprentice painter, full-time, beginning July 23, 2008, through November 5, 2008, when he was discharged.

The claimant was working for his employer but at the Cargill Plant location. Cargill prohibits any person from smoking while on their property. When the claimant began working at the Cargill plant, he was given training about the no-smoking policy and knew that he was not to smoke on Cargill's property, including their parking lot.

On November 5 a security guard at the Cargill plant notified the employer that the claimant and one of his coworkers had been seen smoking in the parking lot of the plant. The claimant drove his truck into the plant parking lot and was allegedly smoking when he exited his truck. The claimant denied both at the time of the incident and at the hearing that he was smoking.

Security cameras recorded what occurred in the parking lot but were not reviewed by the employer when the decision to discharge the claimant was made. The claimant contends that he had a pen in his mouth that the security guard mistook for a cigarette. The claimant also alleges that the security guard did not like him and was making up allegations to get him fired. The security guard did not testify at the hearing. The employer did not witness the claimant smoking in any area where he should not have been.

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.

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).

The claimant denies smoking on the Cargill location. The employer presented no firsthand witnesses that actually saw the claimant breaking the no-smoking rule.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. Schmitz v. IDHS, 461 N.W.2d 603, 607 (Iowa App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. Schmitz, 461 N.W.2d at 608.

The claimant alleges that security cameras would reveal he was not smoking, but the employer did not review the tapes. The employer's evidence does not establish that the claimant deliberately and intentionally acted in a manner he knew to be contrary to the employer's interests or standards. In short, substantial misconduct has not been established by the evidence. While the employer may have had good cause to discharge, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

DECISION:

The December 23, 2008, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

tkh/kjw