

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BERNARD G TARULIS**  
Claimant

**APPEAL NO. 13A-UI-09092-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OLYMPIC STEEL IOWA INC**  
Employer

**OC: 07/07/13**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Olympic Steel Iowa, Inc. filed a timely appeal from a representative's decision dated July 24, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on September 11, 2013. Claimant participated. The employer participated by Ms. Johanna Mahoney, Human Resource Representative. Employer's Exhibits A and B were received into evidence.

**ISSUE:**

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered the evidence in the record, the administrative law judge finds: Bernard Tarulis was employed by Olympic Steel Iowa, Inc. from November 14, 2011 until June 26, 2013 when was discharged from employment. Mr. Tarulis was employed as a full-time machine operator and was paid by the hour. His immediate supervisor was Theresa Peterson.

Ms. Tarulis was discharged based upon an incident that took place on June 26, 2013. On that date the claimant and other workers were removing scrap metal from a cutting area inside the plant. The claimant and other workers with him were instructed to "take five minutes" by their supervisor because a crane operator was taking a break and the work could not continue until the crane operator's break had concluded. Mr. Tarulis, who was operating a fork truck at the time, backed the fork truck out to an outside area and shut it off. The claimant then lit a cigarette and placed a short telephone call via his cell phone to his mother who was ill. The claimant was observed by his supervisor and was sent home at that time. Mr. Tarulis was officially notified of his discharge two days later. The employer considered the claimant's conduct to be unacceptable because the company recently had a fire at its facility caused by unauthorized smoking and the claimant was not smoking in one of three newly designated smoking areas. The employer also believed that the claimant's conduct in smoking on an openly operated forklift was dangerous and that his cell phone use was unauthorized. A

decision was therefore made to terminate Mr. Tarulis from his employment. Mr. Tarulis had not been previously warned for similar conduct.

Mr. Tarulis was not aware that he was breaking company policy at the time. The rule about smoking in three designated smoking areas only was a new rule and had been made while Mr. Tarulis had been on Family Medical Leave Act leave. In the past smoking had been authorized in outside areas during times that employees were on break and cell phone use had also been authorized during break times in other areas except on the production floor. The claimant was also unaware that the employer had recently had a fire at the facility caused by unauthorized smoking and that the rules had been changed during his absence.

### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes intentional misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does not.

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 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 the 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 the denial of unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant the 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.

In the case at hand the claimant had been absent on Family Medical Leave during a time in which the employer had designated specific smoking areas due to a recent fire at the plant. On June 26, 2013, Mr. Tarulis reasonably believed that he had been allowed a short break time and that by going to an outside area he had neither violated the company’s smoking rule or its cell phone use rule. Because company propane operated fork trucks were regularly used in open flames in the cutting process at the plant and the training had only referenced not smoking in “refueling areas” Mr. Tarulis did not believe that smoking on the machine that had been shut off had created a danger or was a violation of company policy.

While the employer’s decision to terminate Mr. Tarulis may have been a sound decision from a management viewpoint, for the above-stated reasons the administrative law judge concludes that the evidence in the record does not show intentional disqualifying misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. Benefits are allowed providing the claimant is otherwise eligible.

**DECISION:**

The representative’s decision dated July 24, 2013, reference 01, is affirmed. The claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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