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

JACK WILLIAMS
826 – 1ST ST N APT #2
NEWTON IA 50208

FBG SERVICE CORPORATION
C/O JOHNSON AND ASSOCIATES
NOW TALX UC EXPRESS
PO BOX 6007
OMAHA NE 68106-6007

Appeal Number: 05A-UI-07441-RT
OC: 06-19-05 R: 02
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)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, FBG Service Corporation, filed a timely appeal from an unemployment insurance decision dated July 12, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Jack Williams. After due notice was issued, a telephone hearing was held on August 4, 2005, with the claimant participating. Larry Karlovsky, Program Manager, participated in the hearing for the employer. The employer was represented by Jessica Meyer of Johnson and Associates, now TALX UC eXpress. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time cleaning specialist from July 15, 1999, until he was discharged on June 21, 2005. The claimant was discharged for issues involving not performing his work correctly or appropriately. The claimant was in charge of cleaning certain areas at the Maytag plant. On June 21, 2005, the employer's witness, Larry Karlovsky, Program Manager, received some complaints from Maytag about the cleaning in areas assigned to the claimant. Mr. Karlovsky went out to Maytag and observed dust on filing cabinets and a great deal of dust in the payroll office. He also observed a piece of paper in the deli that he had observed a day or two before. He also observed that the foyer floor was dusty, even containing food crumbs under the furniture. The claimant was assigned to these areas, but others were also assigned to these areas as well. The employees alternated on dust mopping the areas. Mr. Karlovsky confronted the claimant, and the claimant had no response and was then discharged. One week earlier similar issues had been raised about areas the claimant was cleaning at Maytag and Mr. Karlovsky had hired extra people to clean the area at the request of Maytag.

On April 3, 2003, the claimant received a verbal warning for not doing his work, but on that occasion the claimant had permission to leave work early and had done so. The claimant received a written warning on December 7, 2003, for not mopping the paint office and not sweeping the bathroom or vacuuming the carpet. On April 19, 2004, the claimant was suspended for not cleaning the carpeting thoroughly and for not cleaning as much carpeting as he had indicated that he had cleaned. The claimant conceded that the carpet was not as clean as it could have been, but it was because he had no time to clean it appropriately on the night in question. The claimant was aware at that time that further violations could result in his discharge. The claimant did receive some other oral warnings thereafter about his cleaning and the claimant attempted to clean better thereafter. Pursuant to his claim for unemployment insurance benefits filed effective June 19, 2005, the claimant has received unemployment insurance benefits in the amount of $974.00 as follows: $74.00 for benefit week ending June 25, 2005 (earnings $113.00); and $150.00 per week for six weeks from benefit week ending July 2, 2005 to benefit week ending August 6, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. He is 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.

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 parties agree, and the administrative law judge concludes, that the claimant was discharged on June 21, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, Larry Karlovsky, Program Manager, credibly testified that after receiving complaints from Maytag, where the claimant was assigned to clean, he went out to the site and observed certain areas assigned to the claimant and others for cleaning. He observed dust on filing cabinets, extreme dust in the payroll office, a paper in the corner in the deli that had been there for a couple of days, and a dusty foyer floor. However, Mr. Karlovsky did not demonstrate by a preponderance of the evidence that these conditions were caused by any willful or deliberate behavior on the part of the claimant. The issue really becomes whether these conditions were caused by the recurring carelessness or negligence on the part of the claimant to the extent that it establishes disqualifying misconduct.

Although it is a close question, the administrative law judge concludes that there is not a preponderance of the evidence that the conditions observed by Mr. Karlovsky were caused by the repeated carelessness or negligence of the claimant, at least to the extent that would establish disqualifying misconduct. The claimant credibly testified that others were also assigned to the areas that he was to clean and that they alternated certain jobs. The claimant could not address certain of the matters raised by Mr. Karlovsky, including the paper in the deli. The claimant had received a verbal warning on April 9, 2003, for allegedly not doing his work, but the claimant testified credibly that he had permission to leave work early and did so, and thus his work was not completed. The claimant received a written warning on December 7,

2003 for not mopping the paint office, not sweeping the bathroom, and not vacuuming the carpet. The claimant did not recall this warning, but the administrative law judge concludes that he received the warning. However, the administrative law judge notes that this warning occurred more than 18 months before the claimant was discharged. The claimant was suspended on April 19, 2004, when the carpet was not cleaned satisfactorily and the claimant had indicated that he had cleaned certain carpet that he had not cleaned. The claimant conceded the carpet was not clean on that occasion but testified credibly it was because he had no time to do so. The claimant did concede that he was aware that after the suspension his job was in jeopardy, but the administrative law judge notes that the suspension occurred over 14 months before the claimant's discharge. The claimant had been an employee of the employer's for almost six years. The administrative law judge concludes that the claimant should have received some kind of additional formal warnings or suspensions or other disciplines more recently if he was going to be discharged for his negligence or carelessness. The claimant did concede that he received some verbal warnings, but the claimant also testified that at that time he tried to do better.

This is a very close question, but on the record here, because of the claimant's long employment with the employer and the lengthy period of time between any disciplines and his discharge, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that the claimant's failures to clean were carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. At most, the claimant's behavior here was mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity or ordinary negligence in isolated instances and is not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
>
> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $974.00 since separating from the employer herein on or about June 21, 2005 and filing for such benefits effective June 19, 2005. The administrative law judge concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of July 12, 2005, reference 01, is affirmed. The claimant, Jack Williams, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

pjs/kjw