

**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**

**JIM L WOOD
102 SHARON AVE
MARSHALLTOWN IA 50158**

**BOUCHER MASONRY INC
PO BOX 56
BOONE IA 50036**

**Appeal Number: 04A-UI-08056-LT
OC: 07-04-04 R: 02
Claimant: Appellant (2)**

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/Misconduct

STATEMENT OF THE CASE:

Claimant filed a timely appeal from the July 21, 2004, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 17, 2004. Claimant did participate. Employer did participate through Tod Boucher and Bob Bair.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time bricklayer through May 4, 2004 when he injured his lower back at work while lifting blocks. Claimant mentioned that his back was hurt and he needed to see a doctor. Kyle Landis, coworker on the same scaffold, told claimant to make sure he tells Bair before he leaves. Claimant walked over to Bob Bair, foreman, who was on the phone in his

truck and said, "I hurt my back I'm going to the doctor." Bair said, "just a minute" to the person on the phone and asked claimant what he said. Claimant repeated himself. Bair said, "okay see you."

The next day claimant advised Tod Boucher and Bair that he had hurt his back at work and could not afford to go to a doctor. Employer did not suggest employer's designated doctor or accompany claimant for medical evaluation. Claimant said there was no way given his back pain that he could continue to work laying block. Boucher did not suggest any alternative or light duty work or that claimant see a physician to determine his ability to work. A couple of weeks later Boucher was in Marshalltown and dropped off claimant's check. At that time, claimant asked for any other kind of work except laying block because his back still hurt him. Boucher did not respond specifically to claimant's request for work but suggested claimant look for other work through the union such as washing buildings.

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).

While Bair claims that claimant told him that his back was sore and he could not take the work anymore, he did not recall all aspects of the conversation and did not recall specifically whether or not claimant said he was injured or that he was going to the doctor. His testimony was also inconsistent in pertinent parts with that of Tod Boucher. Claimant's specific and consistent details of the events and conversations are credible. Employer took advantage of claimant's lack of sophistication about workers' compensation procedures and legal representation and constructively ended his employment involuntarily. Claimant had reported his injury to the employer, had indicated he could not afford treatment from a physician, and had requested lighter duty work, all of which employer ignored. Given the nature of the bricklaying business, employer can reasonably expect work related injury claims and should have addressed claimant's notice as such. Claimant was effectively discharged from his employment for no disqualifying reason by employer's inaction. Benefits are allowed.

DECISION:

The July 21, 2004, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

dml/kjf