

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

SHEREE C LEWIS  
803 CHESTER  
OTTUMWA IA 52501

EXCEL CORPORATION  
c/o TALX UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166 0283

Appeal Number: 04A-UI-12523-DWT  
OC: 10/24/04 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, 4<sup>th</sup> 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 are 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Excel Corporation (employer) appealed a representative's November 10, 2004 decision (reference 01) that concluded Sheree C. Lewis (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 13, 2004. The claimant participated in the hearing. Adrianna Cobos, a human resource assistant, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer discharge the claimant for work-connected misconduct?

#### FINDINGS OF FACT:

The claimant started working for the employer on April 20, 1993. She worked as a full-time production worker. The claimant knew the employer allowed employees to smoke only in designated areas.

On April 16, 2004, the employer warned the claimant after she had been observed smoking in the locker room. The locker room at work was not a designated smoking area. On June 4, 2004, the employer again observed the claimant smoking in the locker rooms. The employer gave the claimant a three-day suspension for this violation. The written warning the claimant received for this violation informed her she could be discharged if the employer observed her again smoking in a non-designated area.

On October 26, 2004, as the claimant was leaving work, she had a cigarette in her hand. A supervisor stopped the claimant as she was leaving and asked to see the claimant's identification. The claimant initially thought the supervisor stopped her because she was drinking water. The claimant forgot she had an unlit cigarette in her hand. The supervisor, however, reported that the claimant's cigarette was lit when she stopped the claimant. On October 26, 2004, the employer discharged the claimant for violating the employer's smoking policy for a third time.

#### REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act. 871 IAC 24.32(8).

Based on the reports the employer received from a supervisor, the employer established a compelling business reason for discharging the claimant. The employer, however, relied on information from a supervisor who did not participate in the hearing. The claimant's testimony is credible and must be given more weight than the employer's reliance on unsupported hearsay.

information. Therefore, the findings of fact reflect the claimant's version of events and she did not have a lit cigarette in her hand as she left work on October 26, 2004.

The evidence does not establish the claimant committed a current act of work-connected misconduct. The last time the claimant violated the employer's smoking rules was in early June 2004. The claimant's employment separation was for nondisqualifying reasons and the claimant is qualified to receive unemployment insurance benefits as of October 24, 2004.

**DECISION:**

The representative's November 10, 2004 decision (reference 01) is affirmed. The employer discharged the claimant for business reasons that do not constitute work-connected misconduct. As of October 24, 2004, the claimant is qualified to receive unemployment insurance benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

dlw/b