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

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Appeal Number: 04A-UI-06255-SWT
OC 05/09/04 R 04
Claimant: Appellant (2-R)

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

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated May 26, 2004, reference 01, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on July 1, 2004. The parties were properly notified about the hearing. The claimant participated in the hearing with witnesses, Donavan Altenhofen and Jason Anderson. Barbara Farris participated in the hearing on behalf of the employer with witnesses, Bob Farris, Anthony Farris, and Wendy Carson. Exhibits One and Two were admitted into evidence at the hearing.

FINDINGS OF FACT:

The claimant worked full time for the employer as the landscape manager from April 9, 2001, to May 10, 2004. His supervisor was the general manager, Anthony Farris. The claimant received a written warning on September 10, 2003, for allowing a non-employee to drive a

company vehicle in violation of the employer's work rules. After the warning, the claimant had no further problems of a similar nature. The claimant received a verbal warning in February 2004 for making excessive personal cellular phone calls. The claimant reimbursed the employer for the calls and did not have any similar problems afterward.

Management with the employer was unhappy with the fact that the claimant took one weekday afternoon per week off work because of a visitation arrangement for his son. They suspected the claimant was using the afternoon off to work in his landscaping business. The employer, however, agreed to this afternoon off when the claimant was hired and the employer's suspicions that he was working on his afternoon off were untrue. The employer never told the claimant that he would no longer get the afternoon off or warned him that taking the afternoon off was putting his job in jeopardy.

In April 2004, the president of the company, Bob Farris, informed the claimant that the employer could not afford to put gravel down everywhere in yard. Sometime afterward, the claimant was involved in a project that required him to move products from one area to another. After moving some products on pallets, there was a problem with the products shifting and the bands on the pallets breaking because the products were on an incline. The claimant graded the area and added some gravel to make sure the products were stable. Farris discovered what the claimant had done and considered it insubordination.

Bob Farris had informed the claimant and other workers that he expected them to work every Saturday during the busy season from April through June. The claimant had a volunteer commitment scheduled for May 1, 2004. He checked to see if one of his employees who had the day off could work that day and he made sure that one of the other employees was going to be at work. He then asked Anthony Farris whether he could have the day off. Anthony Farris said that it was fine that he take the day off as long as these two employees were there to work. Bob Farris, however, considered the claimant's failure to work on May 1 to be a violation of his instructions and insubordination.

As a result of the above incidents, the employer discharged the claimant on May 10, 2004.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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).

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. 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.

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 substantial and 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).

While the employer may have been justified in discharging the claimant, no current acts of work-connected misconduct as defined by the unemployment insurance law have been established in this case. The final incidents do not involve misconduct. The claimant exercised his judgment as the landscape manager to add gravel to an area where there was not enough gravel to hold products stably. He did not willfully and substantial violate the instructions given by Farris but was trying to perform his duties competently. In regard to not working on May 1, the claimant acted reasonably in getting approval from his direct supervisor to take the day off. If there was a necessity for getting the time off cleared with Bob Farris, Anthony Farris should have told him that rather than saying it was fine that he take the day off. Any other acts

presented by the employer as reasons for his discharge were too remote in time to be considered current acts of misconduct.

The employer has presented in its protest of the claim and appeal of the decision awarding the claimant benefits evidence that the claimant was performing substantial work in his self-employment business. This evidence raises an issue of whether the claimant is available for work, which has not been determined to this date. The issue of whether the claimant is available for work is remanded to the Agency for investigation and formal determination.

DECISION:

The unemployment insurance decision dated May 26, 2004, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The issue of whether the claimant is available for work is remanded to the Agency for investigation and formal determination.

saw/s