

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KERRY E CAROTHERS
Claimant

APPEAL NO: 12A-UI-02889-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 02/05/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Kerry E. Carothers (claimant) appealed a representative's March 16, 2012 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Tyson Fresh Meats, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 12, 2012. The claimant participated in the hearing and was represented by Dan Connell, attorney at law. Will Sagar 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:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on September 2, 2008. He worked full-time as a second shift production worker on the kill floor at the employer's Storm Lake, Iowa, pork processing facility. His last day of work was February 3, 2012. The employer discharged him on February 7. The reason asserted for the discharge was having had three safety violations in a 12-month period.

On May 9, 2011, the claimant received a warning for a safety violation for sharpening a knife without wearing the necessary protective gloves. On December 29, 2011 the claimant was given a warning and a suspension for a second safety violation for excessively running very hot water.

On January 31, 2012, the claimant had gone outside for his second break. When he came back inside, he proceeded through the downstairs doors towards the stairs that would take him up to

the second floor kill floor where he worked. He forgot to exchange his cap for a hard hat before going through the doors; but, by the time he got to the base of the stairs, he remembered he needed to switch headgear and went back and got his hard hat. However, a manager had seen him in the area between the doors and the base of the stairs without his hard hat. As a result, he was sent home on suspension on February 3, and on February 7 was informed he was discharged for having had the third safety violation in the year.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is having had a third safety violation in a year. The mere fact that an employee might have multiple incidents of unsatisfactory job performance does not establish the necessary element of intent; misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra; *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). There is no evidence the claimant intentionally failed to initially put his hard hat back on before approaching the stairs, and he did quickly recognize on his own his failure and promptly remedied the situation before he had gotten even close to his work area. Under the circumstances of this case, the claimant's initial failure was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, and was a good-faith error in judgment or discretion; the employer has not established that the failure was substantial misbehavior. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's March 16, 2012 decision (reference 01) is reversed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw