

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SCOTT ROSS**  
Claimant

**APPEAL NO: 15A-UI-13606-JE-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**A TO Z DRYING INC**  
Employer

**OC: 11/08/15**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the December 2, 2015, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 4, 2016. The claimant participated in the hearing with his brother/witness/representative Brian Ross. Katherine Mayer, Accountant and Katie Penfold, Senior Manager, participated in the hearing on behalf of the employer.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time packaging employee for A to Z Drying Inc. from May 7, 1993 to October 13, 2015. He was discharged for violating the employer's workplace violence policy.

The claimant is intellectually challenged. On September 24, 2015, the claimant asked a co-worker for a cigarette. The conversation was conducted by text message. The claimant told his co-worker, who is also intellectually challenged and lives in the same building as the claimant, "Sure am craving for a smoke lol." The co-worker replied, "Me too but I got make mine last." The claimant stated, "I know." The remainder of the co-worker's comments were deleted by the employer. The claimant then said, "Thanks a lot. I need a cig or kill" at 6:43 p.m. He told his co-worker, "Don't ever talk to me again and you'll have to find a new place to live," at 7:38 p.m. At 9:08 p.m. the claimant said, "I'm sorry but need a damn cig now" and at 9:13 p.m. the conversation ended with the claimant stating, "Come on man just one." The co-worker reported the situation to his supervisor and was instructed to report it to Human Resources but did not do so until October 13, 2015.

On October 9, 2015, another employee complained about the claimant's work performance and also said he was "tired of (the claimant) hitting everyone up for cigarettes." On October 12,

2015, a third employee reported the claimant's "excessive" requests for cigarettes from other employees.

After receiving those three reports the employer contacted its attorney and was advised to terminate the claimant's employment for violating the employer's zero tolerance for workplace violence policy. The employer notified the claimant October 13, 2015, his employment was terminated.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. 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 maintains the text message contained threats to the other employee's life and livelihood, there is not enough evidence to support their view. The claimant is intellectually disabled. The employer is relying on his text messages stating, "Thanks a lot I need a cig or kill" and "Don't ever talk to me again and you'll have to find a new place to live" to demonstrate the claimant was threatening the other employee's life and livelihood. One problem with the employer's conclusion is the sentence is not complete. "Thanks a lot I need a cig or kill" could have many meanings. It could be a saying as when people say, "I would kill for a (fill in the blank)." It could mean he needed a cigarette or he was going to kill himself, which is another colloquialism. There are several ways that sentence could end or be interpreted because it was incomplete and the claimant stated he was simply joking. While the claimant and that employee lived in the same building, there is no evidence indicating the claimant had any control over whether the other employee could continue to live in the building. There is evidence indicating both men had difficulty managing their money and borrowed back and forth from each other, including cigarettes, frequently. The text message cited by the employer as evidence of threatening behavior does not meet that definition or rise to the level of disqualifying job misconduct.

Two other employees complained the claimant asked them for cigarettes frequently as well. Although the claimant's requests could be annoying or make his co-worker's uncomfortable, asking for cigarettes is not necessarily threatening or violent behavior. The employer never warned the claimant, a 22 year veteran of the company, to stop asking his co-worker's for cigarettes, a simple action that may have stopped the behavior. Instead the employer moved to termination without ever discussing the problem with the claimant.

Under these circumstances, the administrative law judge concludes the employer has not met its burden of proving intentional, disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits must be allowed.

**DECISION:**

The December 2, 2015, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/css