

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEVE LIPPSTOCK
Claimant

APPEAL NO: 08A-UI-08189-B

**ADMINISTRATIVE LAW JUDGE
DECISION**

AADG INC
Employer

**OC: 06/08/08 R: 02
Claimant: Appellant (1)**

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Steve Lippstock (claimant) appealed an unemployment insurance decision dated September 4, 2008, reference 02, which held that he was not eligible for unemployment insurance benefits because he was discharged from AADG, Inc/Curries-Graham (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was held in Mason City, Iowa on November 17, 2008. The claimant participated in the hearing. The employer participated through Mark Evers, Director of Human Resources and Dan McGuire, Employee Relations Manager. Employer's Exhibits One through Four and Claimant's Exhibit A were admitted into evidence. 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:

The issue is whether the employer discharged the claimant for work-related misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time production employee from December 10, 2002 through August 13, 2008 when he was discharged per the employer's progressive disciplinary policy. Employees are discharged after four corrective action steps within a 12-month period. Employees are formally counseled, given a written warning, a suspension and then terminated on the final step. The claimant received a formal warning on March 3, 2008 for absenteeism. A written warning was issued to him on April 30, 2008 for a horseplay and safety violation. He received a final written warning and a three-day suspension on May 8, 2008. The third warning was another horseplay and safety violation after he was seen "messing with one of the light guards on the brakes." He was directed to leave other people's equipment alone and to stay at his work station. The claimant signed the first warning but refused to sign the second and third warnings.

The final corrective action was issued to him on August 13, 2008 for smoking in the bathroom. Employer policy and state law prohibit smoking in the work place. There were several incidents

in which the claimant was previously suspected to have violated this policy but there was insufficient evidence to confirm it. Finally the employer had five co-employees who wrote statements reporting their belief that the claimant was smoking in the bathroom. An employee named Keith was in the bathroom two months before the termination when he started to smell smoke. There was only one other person in the bathroom at the time and Keith waited for the person to come out and it was the claimant. Allan was in the bathroom on August 7, 2008 when the claimant came in to the center stall and had a cigarette. Lee often went to the bathroom to get his diabetes injections and although he never saw the claimant smoking, he noticed cigarette butts and smelled smoke right after the claimant left. Vernon swears the claimant smokes cigarettes in the men's bathroom on a nightly basis. And finally, Curtis reported on approximately August 12, 2008 that the claimant has said several times a night that he is going to go to the bathroom and have a smoke. When the claimant returned, he always smelled like he just had a cigarette. The employer was convinced the claimant was repeatedly violating the smoking policy and discharged him as a result.

REASONING AND CONCLUSIONS OF LAW:

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

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.

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.

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 claimant was discharged on August 13, 2008 per the employer's progressive disciplinary policy after receiving four corrective action warnings within a 12-month period. He denies smoking in the bathroom which resulted in the final disciplinary action prompting his discharge. The employer had previously suspected the claimant was violating the smoking policy but did not have sufficient evidence confirming that fact. However, the previous suspicions combined with the written statements of five co-employees convinced the employer the claimant was repeatedly violating that policy. The employer has met its burden by a preponderance of the evidence. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated September 4, 2008, reference 02, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs