IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

THOMAS R HANSEN
Claimant

DOMINO CHEVROLET INC
Employer

APPEAL NO: 10A-UI-08089-ST

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/02/10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct

STATEMENT OF THE CASE:

The employer appealed a department decision dated June 4, 2010, reference 01, that held the claimant was not discharged for misconduct on May 6, 2010, and benefits are allowed. A telephone hearing was held on July 21, 2010. The claimant participated. Lori Vanahn, Business Manager, Joe Glasnapp, Service Technician, Gary Domino, Service Manager/Owner, and Alan Domino, President/Manager-Owner, participated for the employer. Employer Exhibits One and Two was received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment on February 2, 2004, and last worked for the employer as a full-time service technician on May 6, 2010. The claimant and co-worker Glasnapp were issued a verbal warning about their working relationship on October 8, 2009. The claimant had been missing work and it put a burden on his co-worker to get the jobs done that caused a strain in their working relationship. The claimant was also counseled about his missing work.

Glasnapp observed the claimant clock-out for lunch shortly before the noon hour on May 6, and he thought claimant spent an unusual amount of time in doing so. A short time later, Glasnapp pulled his time card to clock out for lunch and by his name Joe, the words “is a fuck” was written. He hadn’t notice these words when he clocked in at 7:00 a.m. that day. He took the time card to Owner Domino.

Domino followed the claimant to his work area when he returned from lunch. Domino discharged the claimant for the profanity on Glasnapp’s time card. The employer added that it discharged the claimant for the profanity on the time card, profanity it later discovered written on

a clipboard kept in the shop, attitude and attendance issues. Claimant denies writing the profanity on the time card and clipboard.

REASONING AND CONCLUSIONS OF 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.

The administrative law judge concludes the employer has failed to establish that the claimant was discharged for misconduct in connection with employment on May 6, 2010.

The employer failed to establish misconduct regarding claimant's attendance issues, because it never issued him a clear and meaningful warning that his job was in jeopardy to the point that a further occurrence would cause termination. While the claimant may have been counseled about his attendance in October 2009, he was never put on notice that his failure to report or missing work had reached the point it would no longer be tolerated.

The employer had no direct evidence the claimant was the person that wrote the profanity on his co-worker's time card. The circumstantial evidence is that the claimant had a record of an unpleasant working relationship with Glasnapp (motive to write it), and access to the time card when he clocked-out for lunch. The circumstantial evidence does not outweigh claimant's denial he wrote the profanity. The employer focused on the claimant to the exclusion of any other person, such that it conducted no broader investigation to consider any other person.

Since the employer discharged the claimant after it discovered the clipboard profanity, it could not have been a consideration for discharge.

DECISION:

The department decision dated June 4, 2010, reference 01, is affirmed. The claimant was not discharged for misconduct on May 6, 2010. Benefits are allowed, provided the claimant is otherwise eligible.

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Randy L. Stephenson
Administrative Law Judge

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Decision Dated and Mailed

rls/pjs