

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LARRY F ORBAN
Claimant

APPEAL NO. 08A-UI-04811-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MILLER WATER CONDITIONING INC
Employer

**OC: 04/06/08 R: 01
Claimant: Respondent (1)**

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Miller Water Conditioning, Inc. (Miller), filed an appeal from a decision dated May 12, 2008, reference 01. The decision allowed benefits to the claimant, Larry Orban. After due notice was issued, a hearing was held by telephone conference call on June 3, 2008. The claimant participated on his own behalf. The employer participated by President Dave Miller.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Larry Orban was employed by Miller from January 3 until March 28, 2008, as a part-time utility person. The job duties of the position were explained to him when he interviewed for the job and he assured President Dave Miller he could perform the physical aspects. These included delivering bottled water and 40-pound bags of salt and helping deliver and install major appliances. He was only available 20 hours per week because he had recently retired and could not work more hours than that and remain eligible for his retirement benefits.

The claimant was not able to perform the job as quickly as the employer had hoped. Other delivery persons carried two 40-pound bags of salt, but the claimant could only carry one at a time. This caused the deliveries to be slower and, working fewer hours per week, this caused the employer some concern. In addition, there was an incident where the claimant could not hold up his end of a refrigerator and it almost caused injury to the other person with whom he was working.

In mid-March 2008 Mr. Miller notified the claimant he would not be retained after his 90-day probationary period. The employer stated he could not lift the weight or do the amount of work needed for the job in 20 hours per week with his limited lifting ability, and he would also potentially cause injury to himself or others. He was allowed to work until the end of the month and then discharged.

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.

871 IAC 24.32(5) provides:

(5) Trial period. A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

It appears the claimant substantially overestimated his ability to do the job he accepted. However, there is no evidence of deliberate or willful misrepresentation, only too much optimism. Mr. Orban sincerely believed he was doing a good job and was keeping up with his job duties, but the employer emphatically disagreed. Inability to do the job to the satisfaction of the employer is not misconduct under the provisions of the above Administrative Code section. Disqualification may not be imposed.

DECISION:

The representative's decision of May 12, 2008, reference 01, is affirmed. Larry Orban is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw