

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JONAH E NEMEC
524½ N GOVERNOR
IOWA CITY IA 52245-3033

ANGEL INVESTMENTS LLC
HOUSE OF AROMAS
119 – 2ND ST STE 300
CORALVILLE IA 52241

Appeal Number: 06A-UI-07518-SWT
OC: 06/25/06 R: 03
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated July 21, 2006, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was scheduled for August 14, 2006. The hearing was reopened because the employer did not receive the hearing notices and was only aware of the hearing after receiving potential exhibits in the mail. The hearing was rescheduled and conducted on August 15, 2006, with the consent of the parties. The claimant participated in the hearing with witnesses, Corey Gingerich and Beth Sampson. Chris Nguyen participated in the hearing on behalf of the employer with witnesses, Andy Kwak, Jordon Collins, and Katie Brannan.

FINDINGS OF FACT:

The claimant worked part time for the employer as a coffee maker from April 18, 2006, to June 23, 2006. The owner of the business is Chris Nguyen. The claimant's supervisor was Andy Kwak.

Kwak discharged the claimant by phone on June 23, 2006, after receiving complaints from other employees about the claimant's unsatisfactory work performance. This included an incident in early May in which the claimant did not properly backflush the espresso machine and an incident in early May in which the manager on duty felt the claimant's drinks were not up to the employer's standards. Kwak spoke to the claimant in May about this and had him take time off to think about whether he wanted to continue in employment. In mid-May, there was an incident in which the claimant was vacuuming the carpet while there were customers still in the restaurant. He followed his supervisor's instructions and put away the vacuum until the end of the shift, but the supervisor felt the claimant spoke harshly to her. In mid-June, a supervisor corrected the claimant for not bringing a water bucket out when he was mopping the floor. He told the supervisor that she was getting on his nerves. The claimant left for a short time after that but then returned and finished his mopping. The supervisor felt he should have been waiting on customers rather than cleaning. The claimant was not discharged until about eight days later.

The employer's account is not presently chargeable for benefits paid to the claimant, since it is not a base period employer on the claim.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 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 may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established. No current act of willful or substantial misconduct has been proven in this case. At most, the employer has shown unsatisfactory work performance, which did not rise to the level of misconduct under the law. The final incident, which happened over a week before the claimant was discharged, involved the claimant not mopping the way the supervisor wanted and making an annoyed comment. He completed the cleaning, but the supervisor thought he should have helped her instead of cleaning. There is no evidence that he violated any instruction given to him by the supervisor that evening, only that he did a different work task than the supervisor thought he should do.

The employer's account is not presently chargeable for benefits paid to the claimant, since it is not a base period employer on the claim. If the employer becomes a base period employer in a future benefit year, its account may be chargeable for benefits paid to the claimant based on this separation from employment.

DECISION:

The unemployment insurance decision dated July 21, 2006, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

saw/kjw