

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BEAU MALCOLM

Claimant

APPEAL NO: 12A-UI-14080-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IA VETERANS HOME - MARSHALLTOWN

Employer

OC: 10/28/12

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Beau Malcolm (claimant) appealed an unemployment insurance decision dated November 16, 2012, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from Iowa Veterans Home - Marshalltown (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 7, 2013. The claimant participated in the hearing. The employer participated through Mark Freland, Food Service Director; Susie Curley, Assistant Food Service Director; and Sandra Linsin, Employer Representative. 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 claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

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 food service worker from November 26, 2007 through October 31, 2012 when he was discharged for a consistent failure to comply with the rules. He began part-time but became full-time shortly thereafter. The employer has a progressive disciplinary policy in which employees are given a written warning, a one-day suspension, a three-day suspension and a five-day suspension with a final warning prior to termination. Written warnings do not become part of the employee's permanent record if no additional warnings are issued within the following 12 months.

The claimant had received several disciplinary warnings prior to 2010 but these did not become part of his permanent record until April 1, 2012 when a written warning was issued. He received a one-day suspension on September 15, 2010; a three-day suspension on December 13, 2010; and a five-day suspension with final warning on May 24, 2011. The claimant should have been discharged upon any further rule violations but was given another five-day suspension with final

warning on November 10, 2011. This warning was issued for the claimant's repeated refusal to wear hair nets and beard nets even after numerous verbal warnings.

On October 29, 2010, the Marshalltown Police removed the claimant from the work site and arrested him. They reported to the employer that the claimant had stolen license plates on his vehicle and the police removed the license plates prior to arresting him. The claimant returned to the work site 90 minutes later. On October 30, 2012, the claimant was seen by a supervisor using his cell phone. Cell phones are not allowed to be used while working and the claimant had been previously counseled for using his cell phone while working. Later that same day, the supervisor saw the claimant again using his cell phone and the supervisor directed him to put it away.

The employer conducted an investigation on October 31, 2012 and determined the claimant violated his final warning pursuant to the progressive disciplinary policy. He was absent without authorization on October 29, 2012 and was insubordinate on October 30, 2012 when he repeatedly refused to follow company policy. The claimant was discharged on October 31, 2012. He grieved his termination through the union and the union decided in favor of management on December 10, 2012.

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 discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on October 31, 2012 pursuant to the employer's progressive disciplinary policy. Following his second final written warning, the claimant was absent without authorization and refused to comply with company policy by using his cell phone at work. The claimant's conduct shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. 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 November 16, 2012, reference 01, 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/css