

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TIMOTHY A BAUSCH
Claimant

**JOHN DEERE CONSTRUCTION
EQUIPMENT**
Employer

APPEAL 17A-UI-07297-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/26/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 17, 2017, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 3, 2017. Claimant participated. Employer participated through labor relations employee Clint Biekert.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a maintenance plumber from March 2007, and was separated from employment on June 26, 2017, when he was discharged.

On June 26, 2017, during claimant's scheduled shift at 6:15 a.m., he was radioed by Mark McDermott (an electrician) to go to a certain location (job site). Claimant replied to Mr. McDermott that he would be at the location in fifteen minutes. At 6:31 a.m., claimant's supervisor went to the location and claimant was not present. Claimant had not been to the job site yet. The supervisor then radioed to claimant, but claimant did not respond. At 6:35 a.m., claimant's supervisor found claimant in the cafeteria drinking coffee and talking with cafeteria employees; this was not a scheduled break for claimant. Claimant's supervisor did not say anything to claimant at this time because claimant was in the presence of other cafeteria employees. At 6:57 a.m., claimant's supervisor went back to the job site and claimant still had not been to the job site. Claimant's supervisor then contacted claimant on the radio and claimant stated he was on the way to the job site. Claimant asked his supervisor what was needed at the job site. Claimant's supervisor gave claimant instructions on what was needed. At 7:22 a.m., claimant's supervisor saw claimant driving to the job site. Claimant should have already been at the job site if he was driving to the job site at 6:57 a.m. Claimant's supervisor stopped claimant while he was driving. Claimant again asked his supervisor what was needed. Claimant's supervisor explained what claimant needed for the job site. Claimant told his supervisor that he was only called to the job site 15 minutes ago. Claimant's supervisor told him

that was false. At 7:29 a.m. claimant's supervisor observed claimant at job site starting to work. Later that morning, the employer met with claimant. The employer reminded claimant about the last chance agreement and pointed out the terms that were violated (being unresponsive and unproductive). The employer then discharged claimant.

In March 2017, claimant was discharged for "nested" sleeping. Around the end of April 2017, the employer decided to bring claimant back on a last chance agreement. Claimant was reinstated at the employer at the same level and position as when he was separated in March 2017. The last chance agreement required claimant to be a productive employee and not have to be told to do something multiple times. Claimant was warned that his job was in jeopardy if any other violations occurred. Claimant did not have any disciplinary warnings prior to March 2017.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to job-related misconduct. Benefits are denied.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer's last chance agreement requiring claimant to be a productive employee and not have to be told to do something multiple times was reasonable due to claimant's "nested" sleeping incident in March 2017. Claimant's argument that his conduct was not disqualifying on June 27, 2017, because Mr. McDermott did not tell him the call was an emergency is not persuasive. The parties agree that Mr. McDermott requested claimant come to the job site at 6:15 a.m. The parties agree that claimant told Mr. McDermott he would be there in fifteen to twenty minutes. It takes only ten minutes to get from one end of the facility to the other end. During the hour after claimant responded, he did not contact anyone to let them know he would be late and he was observed in the cafeteria drinking coffee and conversing with other employees, despite being on a last chance agreement. Furthermore, at 6:31 a.m., claimant failed to respond to his supervisor radioing him after the supervisor discovered claimant was not at the job site yet. Claimant then did not start working at the job site until approximately an hour after he responded to Mr. McDermott. The employer has presented substantial and credible evidence that claimant failed to perform his job duties in a timely manner or notify the employer he would be delayed after having been warned. This is disqualifying misconduct.

DECISION:

The July 17, 2017, (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs