

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**GERALD C SCHMITT**  
Claimant

**APPEAL NO: 13A-UI-04738-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ADVANCE SERVICES INC**  
Employer

**OC: 03/31/13**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge  
871 IAC 24.32(1) – Definition of Misconduct  
871 IAC 24.32(8) – Current Act

**STATEMENT OF THE CASE:**

The employer appealed a department decision dated April 18, 2013, reference 01, that held the claimant was not discharged for misconduct on March 25, 2013, and benefits are allowed. A telephone hearing was held on May 22, 2013. The claimant participated. Michael Payne, Risk Management Supervisor, participated for the employer. Employer Exhibits One through Seven 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 witness testimony and having considered the evidence in the record, finds: The claimant began employment on assignment at Pioneer (Hedrick Production Plant) as a full-time warehouseman on November 12, 2012, and last worked for the employer on March 25, 2013. Pioneer has a posted personal cell phone use policy. It allows possession of a phone that is limited to use a lunch or other break time.

The employer issued claimant a written disciplinary warning for violation of the cell phone use policy on January 18, 2013. He was caught using the phone while operating a fork lift.

Pioneer employees reported claimant was using his cell phone while driving into the parking lot to report for work. Pioneer requested the employer end claimant's employment and it complied. Claimant denies using his cell phone on company premises after his January 18 warning.

## 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(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 administrative law judge concludes the employer has failed to establish claimant was discharged for a current act of misconduct in connection with employment on March 25, 2013.

Claimant denies cell phone use on Pioneer property after the earlier warning, and the employer offered no witness and/or written statement from someone who observed it. Since no current act of misconduct of cell phone use is established, job disqualifying misconduct is not established.

**DECISION:**

The department decision dated April 18, 2013, reference 01, is affirmed. The claimant was not discharged for a current act of misconduct on March 25, 2013. 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/tll