

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**BRAYDEN P BECK**  
Claimant

**RILEY PAINT CO INC**  
Employer

**APPEAL 17A-UI-06887-JCT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 06/11/17  
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quitting  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

The employer filed an appeal from the July 6, 2017, (reference 04) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 26, 2017. The claimant did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer participated through Jeff Jennison, president. Dan Weinreich, plant manager, also testified for the employer. Department Exhibit D-1 was admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can any charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a general laborer beginning April 17, 2017 and was separated from employment on June 15, 2017, when he was discharged.

The final incident occurred on June 15, 2017, when the claimant was observed twice being on his cell phone in a highly flammable room, where cell phones are expressly prohibited. The employer has a general policy that prohibits cell phone usage except while on breaks, and the claimant was made aware of it at hire (Department Exhibit D-1). In addition, the employer has two rooms that contain highly flammable materials and therefore no cell phones are allowed in

them, regardless if an employee is on break. There are signs posted reminding employees cell phones are not allowed in the two rooms. The claimant was observed by Julie Staats, lead worker, in the filling room, considered one of the flammable rooms and he was observed text messaging on his phone. Ms. Staats confronted the claimant and told him he could not be on his cell phone in the room because of safety risks. The claimant was again observed the same day by Ms. Staats, returning to the room to use his cell phone. He was subsequently discharged.

In addition to the two cell phone incidents on June 15, 2017, the employer took into account the claimant's two month job history, which included fifteen tardiness, including his final day of employment, five absences, his showing up out of dress code compliance, wearing flip flops and shorts, leaving shifts to go get proper clothing, and retrieve medication, and for his failure to complete his job duty of shrink wrapping product and placing them on pallet jacks. Mr. Weinreich verbally told the claimant his job was in jeopardy prior to discharge. The claimant did not attend the hearing or submit any written documentation in lieu of attending the hearing.

The administrative record reflects that claimant has not received unemployment benefits since filing a claim with an effective date of June 11, 2017. His weekly benefit amount (WBA) is \$264.00. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal.

#### **REASONING AND CONCLUSIONS OF LAW:**

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

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).

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). It is the duty of the administrative law judge as 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 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. *Id.* 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 believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). In this case, the employer has a reasonable policy prohibiting cell phone use except on break time (Department Exhibit D-1). In addition, the employer posts signs prohibiting all cell phone use in two of its rooms, due to flammable materials. Possible complications from cell phone use in the presence of the materials could be catastrophic for the employer. The employer reminds employees not to use their cell phones in the two rooms by posting visible signage. In this case, the claimant was observed on two occasions, leaving his work station to go to the filling room (which is one of the flammable rooms) and text messaging on his cell phone, in light of the employer's policy and confrontation by team lead, Julie Staats.

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). The employer does not allow cell phone use in the filling room because it could cause a fire to break out. No evidence was presented that the claimant's cell phone use in the filling room was due to an emergency. Therefore, the

administrative law judge concludes the employers' request was reasonable. Based on the evidence presented, and in the absence of the claimant refuting the employer's testimony, the administrative law judge finds the claimant's conduct of intentionally using his cell phone in a highly flammable room repeatedly on June 15, 2017, would constitute misconduct.

In addition, it cannot be ignored that the claimant had twenty absences and tardies in two months, had come to work out of compliance with dress code and showed a pattern of disregard for the employer's policies, in light of verbal warning by Mr. Weinreich. Even in the absence of written or final warning, the administrative law judge is persuaded the claimant knew or should have known his job was in jeopardy prior to June 15, 2017 and his repeated safety violation of using his cell phone in a flammable room would lead to his discharge. The employer has established the claimant was discharged for misconduct. Benefits are denied.

Because the claimant's separation was disqualifying, benefits were originally allowed. However, he did not receive any benefits and therefore there is no overpayment in accordance with Iowa Code § 96.3(7). The administrative law judge further concludes the employer satisfactorily participated in the fact-finding interview pursuant to Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10.

**DECISION:**

The July 6, 2017, reference 04, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is relieved of charges associated with the claim.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn