

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LAZARICK CHILDS
Claimant

EJG MANAGEMENT LLC
Employer

APPEAL 18R-UI-10268-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/22/18
Claimant: Appellant (1R)

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

STATEMENT OF THE CASE:

The claimant originally filed an appeal from the August 6, 2018, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for fighting on the job. A hearing was held on September 18, 2018, in appeal number 18A-UI-08462-CL-T, with only the claimant participating. The administrative law judge in that hearing reversed the August 6, 2018, (reference 01) decision. The employer filed an appeal with the Employment Appeal Board and the matter was remanded, in hearing number 18B-UI-08462, to allow the employer to participate. After due notice was issued, a telephone hearing was held on October 29, 2018. Claimant did not participate. Employer participated through Holly Anderson. Official notice was taken of the Findings of Fact in 18A-UI-08462-CL-T.

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 began working for employer in June 2017. Claimant last worked as a full-time kitchen cook. Claimant was separated from employment on July 19, 2018, when he was discharged.

On July 18, 2018, claimant got into an altercation with his coworker, Curtis. Following the altercation Anderson spoke to claimant and Curtis. Curtis told Anderson the argument began with a disagreement over who was emptying a grease vat. According to Curtis claimant started the argument and got physical with him by throwing a punch. Curtis admitted he swung back at claimant. When Anderson spoke with claimant he stated Curtis started the argument and slapped him first. Anderson also reviewed security video taken during the altercation. The video showed claimant approaching Curtis where he was working. Things began to get heated and claimant had Curtis pinned into a corner. The video showed claimant yelling at, then punching, Curtis. Curtis then hit claimant back. Anderson did not see any point in the video where Curtis slapped claimant, put his finger in claimant's face, or otherwise came in physical

contact with claimant, until claimant hit him. According to Anderson, claimant could have retreated from the situation at any time.

The employer has a zero tolerance policy for violence in the workplace. Claimant received a copy of this policy at the time of his hire. Additionally, in May 2018, claimant received a written warning and suspension for getting into a verbal altercation with a coworker. Claimant was transferred to another store as a result and advised by Anderson that further incidents would lead to termination. Claimant was terminated on July 19 as a result of the July 18 altercation.

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:

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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer

made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). 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 decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

There is a disagreement between the parties as to who was the aggressor in the physical confrontation between claimant and his coworker. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events as delineated in the Findings of Fact in appeal number 18A-UI-08462-CL-T.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. Employers generally have an interest in protecting the safety of all of its employees and invitees. Where a claimant participated in a confrontation without attempt to retreat, the Iowa Court of Appeals rejected a self-defense argument stating that to establish such a defense the claimant must show freedom from fault in bringing on the encounter, a necessity to fight back, and an attempt to retreat unless there is no means of escape or that peril would increase by doing so. *Savage v. Emp't Appeal Bd.*, 529 N.W.2d 640 (Iowa Ct. App. 1995). Here, claimant not only failed to retreat from the situation, but the evidence shows he was most likely the aggressor. Even if claimant was not the aggressor, he could had at least attempted to walk away before hitting the other employee, or, if physical contact was necessary to escape, use less violent means, such as pushing the other employee aside. Claimant's physical aggression was in violation of specific work rules and against commonly known acceptable standards of work behavior. This behavior was contrary to the best interests of employer and the safety of its employees and is disqualifying misconduct even without prior warning. Benefits are denied.

DECISION:

The August 6, 2018, (reference 01) unemployment insurance decision is affirmed. 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.

REMAND:

The issues of whether claimant has been overpaid benefits, if those benefits should be repaid, and chargeability to the employer's account, are remanded to the Benefits Bureau of Iowa Workforce Development for initial investigation and determination.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs