

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JAMES E COMER
Claimant

L A LEASING INC
Employer

APPEAL 15A-UI-08661-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/05/15
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 29, 2015, (reference 02) unemployment insurance decision that denied benefits based upon the determination he was discharged for violating a known company rule. The parties were properly notified about the hearing. A telephone hearing was held on August 24, 2015. Claimant James Comer participated on his own behalf. Employer L A Leasing, Inc. participated through Unemployment Benefits Administrator Colleen McGuinty, Marketing and Administrative Assistant Sherry Taube, and Industrial Account Manager Lakendra Miller. Employer's Exhibit 1 was received.

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: The claimant was employed full-time as a general laborer beginning October 1, 2014, and was separated from employment on May 20, 2015, when he was discharged. The claimant was working a light duty assignment at that time and reporting to Marketing and Administrative Assistant Sherry Taube.

On May 20, 2015, Taube observed the claimant with a white bag with red writing on it during his lunch break. At 12:40 p.m., the claimant was observed by Industrial Account Manager Lakendra Miller and Vickie Eilers throwing a white bag with red writing on it in the dumpster. Miller and Eilers noted the conduct was peculiar as he exited the building to throw this in the dumpster rather than using one of the garbage cans in the facility. Eilers sent an email to Taube who retrieved the bag from the dumpster. The bag was the only item in the dumpster and it contained a paper bag with an empty 24 ounce can of beer as well as a receipt from Hy-Vee showing it had been purchased at 11:51 a.m. that day.

Taube asked the claimant to come to her office. She told him he was being taken for a reasonable suspicion alcohol test. She drove him to Concentra where he was given a breathalyzer at 2:25 p.m. His recorded BAC was .017 per 210 L. He was given a second

breathalyzer at 2:39 p.m. with a recorded BAC of .016 per 210 L. The breathalyzer was checked and calibrated at 2:43 p.m. with no issues. The employer was notified of the results and the claimant was terminated for drinking alcohol at work in violation of the employer's policy.

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. Benefits are denied.

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.

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).

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). 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). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). 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).

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.*

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 more credible. The claimant denied he was near the dumpster or that he had gone to Hy-Vee. However, the employer's witnesses were able to provide detailed information about what they witnessed. Additionally, the employer's witnesses had no apparent reason to fabricate their testimony.

The claimant was observed discarding a bag with an empty can of beer in the employer's dumpster. He also tested positive on the breathalyzer. Iowa law allows drug testing of an employee if, among other conditions, the employer has "probable cause to believe that an employee's faculties are impaired on the job." Iowa Code § 730.5. One of the mandates included in the code is that an employer, upon a confirmed positive drug or alcohol test by a certified laboratory, notify the employee of the test results by certified mail return receipt requested, and the right to obtain a confirmatory test before taking disciplinary action against an employee. Iowa Code § 730.5(7)(i)(1). In this case the employer failed to follow the guidelines laid out in the Iowa Code. The Iowa Supreme Court has held that an employer may not "benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." *Eaton v. Iowa Emp't Appeal Bd.*, 602 N.W.2d 553, 557, 558 (Iowa 1999).

However, the claimant's termination did not rely solely on the breathalyzer. The employer has provided credible evidence beyond the breathalyzer showing the claimant possessed and consumed alcohol while at work. He was observed by others discarding a bag in his possession which contained an empty alcohol container. The alcohol was purchased at 11:51 a.m. and consumed at some point before 12:40 p.m. He was seen exiting the employer's building to discard the bag with the can. The claimant's possession and consumption of alcohol on the employer's property was in violation of the employer's known policies and in violation of the employer's best interest. His actions are misconduct even without prior warning.

DECISION:

The July 29, 2015, (reference 02) 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.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/pjs