

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

EMMET FRESE
Claimant

BIRD ONE INC
Employer

APPEAL 20A-UI-00194-JC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/01/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant/appellant, Emmet Frese, filed an appeal from the December 26, 2019 (reference 01) Iowa Workforce Development (“IWD”) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 28, 2020. The claimant participated personally. The employer, Bird One Inc., participated through Brenda Crowe, officer/manager of farm. 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.

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 farm laborer and was separated from employment on November 23, 2019, when he was discharged for safety concerns.

The claimant primary job duties included operating farm equipment including tractors, truck driving and providing mowing/field care to farms. The employer communicated its expectations and rules verbally and provided on the job training through a buddy system. During the claimant’s eight months of employment, he had three separate incidents involving safety.

The first incident occurred on April 21, 2019, while operating a tractor, the claimant hit and knocked over a utility pole, causing the neighboring area to lose all power. The employer was billed \$2,800.00 for the damage and repairs by the utility company. The claimant attributed the accident to the large equipment being difficult to maneuver.

On November 12, 2019, the claimant was working on Farm 18. He was operating a tractor that had a leak in it. The mechanic asked the claimant to start the tractor so he could examine it, and the claimant did so before leaving the tractor and mechanic. Upon returning, the claimant did not verify that the mechanic had completed the repairs. He did not look around the tractor before beginning to move it, which is customary. Instead, he attempted to move the tractor, with the mechanic still underneath it, which could have injured or killed the mechanic.

Eleven days later on November 23, 2019, the claimant was working on Farm 29. On that morning, the claimant, Ms. Crow and the operations manager had met to reiterate job expectations. Then while the claimant, Ms. Crow and the mechanic were preparing the tractors for the day by fueling them, greasing them and cleaning windows, the claimant again attempted to move a tractor while the mechanic was on it working. The claimant did not check the area for the mechanic or others before attempting to move the tractor, and in light of the prior incident. The claimant opined the employer should have better procedures in place when equipment is being worked on. The employer determined the claimant's repeated conduct was too great of a safety risk and discharged him.

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 law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

“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. *Casper 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). 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). 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).

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 not 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.

In this case, the claimant twice in an eleven day period attempted to move a tractor that he knew the mechanic was accessing and working on, without verifying the area was clear and the mechanic was done. Both times, the mechanic was still working under tractor and could have been killed had the claimant successfully moved the tractor. Recognizing the employer does not have formal lock out/tag out type procedures as some companies do, the claimant knew the mechanic was working on the tractor in question and acknowledged that it was custom to check for humans before moving large farm equipment in fields, given the potential safety risk. Certainly after the November 12, 2019 incident, the claimant was on notice that he needed to check that the mechanic was done before trying to move the vehicle. The administrative law judge is persuaded the claimant knew or should have known his conduct on November 23, 2019 was contrary to the best interests of the employer. Therefore, based on the evidence presented, the administrative law judge concludes the claimant was discharged for disqualifying job-related misconduct. Benefits are denied.

DECISION:

The unemployment insurance decision dated December 26, 2019, (reference 01) 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.

Jennifer L. Beckman
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Decision Dated and Mailed

jlb/scn