

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOSHUA E LORD
Claimant

ATLANTIC BOTTLING CO
Employer

APPEAL 19A-UI-01337-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/06/19
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct
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 February 7, 2019, (reference 02) unemployment insurance decision that allowed benefits based on the determination that the alleged misconduct was not a current act. The parties were properly notified about the hearing. A telephone hearing was held on March 1, 2019. Claimant participated and testified. Employer participated through Human Resource Generalist Anne Marie Johnson, Merchandising Supervisor James Pitzle, Merchandising Manager David Hecker, and Human Resource Director Dave Larson. Employer's Exhibit 1 was received into evidence.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid benefits?
Should benefits be repaid by claimant due to the employer's participation in the fact finding?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on June 12, 2018. Claimant last worked as a full-time merchandiser. Claimant was separated from employment on December 14, 2019, when he was discharged. Employer's Exhibit 1 was received into evidence.

On December 1, 2018 claimant was working with another employee, Cody Maldonado, delivering and stocking product at Wal-Mart. Claimant's immediate supervisor, Pitzle, was off that day but received a call from Maldonado stating that claimant was going crazy at the store (Wal-Mart). Pitzle then spoke to claimant and told him to go home for the day. Pitzle began an investigation into the matter on December 4, 2018, as this type of behavior violates the employer's code of conduct, harassment policy, and workplace violence policy. (Exhibit 1). His investigation consisted of interviews with claimant, Maldonado, and two witnesses. One

witness, Andrew Shepard, was an employee of another beverage distribution company and the other, Darwin, was a Wal-Mart employee.

According to Maldonado, claimant suddenly became aggressive toward him while the two were working together after Maldonado joking told claimant to “vamos.” It was reported that claimant pushed a cart towards Maldonado, cursed at him, challenged him to a fight, and then shoulder-checked him while walking out the door. Shepard, who was present for the entire exchange, confirmed Maldonado’s version of events. Darwin was able to confirm some of Maldonado’s version as well, though he was not present until the end of the altercation, when it appeared things might become physical. Claimant denied he was the instigator or that he challenged Maldonado to a physical altercation or became physical with him. Claimant also alleged Maldonado called him a derogatory name in Spanish. Neither witness reported hearing this, though they were not specifically asked about it. Pitzle concluded his portion of the investigation on December 6, 2018 and sent the information he collected to human resources.

Larson received the email from Pitzle on December 7, 2018. Larson then conducted his own investigation, speaking again to the two witnesses to the incident. Both witnesses gave Larson statements consistent with those they have given Pitzle. Larson concluded his portion of the investigation on December 12, after getting Darwin’s second statement. Pitzle and Hecker then met and, in consultation with Larson, determined termination was appropriate. Claimant was then discharged on December 14.

The claimant filed a new claim for unemployment insurance benefits with an effective date of January 6, 2019, but he has not received any benefits to date. Both the employer and the claimant participated in a fact finding interview regarding the separation on February 6, 2019. The fact finder determined claimant qualified for benefits.

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).

Iowa Admin. Code r. 871-24.32(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 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.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, 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. The employer's conclusions were reached after an investigation, which included interviewing two independent witnesses to the incident. Their stories were consistent over two interviews and with the statement given by Maldonado.

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). Claimant's physical aggression when he shoulder-checked Maldonado and threat of 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. The employer discharged claimant two days after the investigation had concluded, making the misconduct a current act. Benefits are denied. As no benefits have been paid to date, the issues of overpayment and participation are moot.

DECISION:

The February 7, 2019, (reference 02) unemployment insurance 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 issues of overpayment and participation are moot.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs