

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**BARRY J HOLDEN**  
Claimant

**MENARD INC**  
Employer

**APPEAL 21A-UI-24007-CS-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 09/19/21  
Claimant: Appellant (2)**

Iowa Code §96.5(2)a-Discharge/Misconduct  
Iowa Code §96.5(1)- Voluntary Quit

**STATEMENT OF THE CASE:**

On October 28, 2021, the claimant/appellant filed an appeal from the October 25, 2021, (reference 01) unemployment insurance decision that denied benefits based on claimant being discharged for violation of a known company rule. The parties were properly notified about the hearing. A telephone hearing was held on January 6, 2022. Claimant participated attorney Judith O'Donohoe. Employer participated through attorney Paul Hammer. The employer called as a witness General Manager, Sam Martin. Exhibits 1, 2, and 3 were admitted into the record. Administrative notice was taken of claimant's unemployment insurance benefits records.

**ISSUE:**

Was the separation a discharge for misconduct for job-related misconduct that would disqualify claimant from state unemployment benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Employer is a retail store. Claimant began working for employer on July 7, 2020. Claimant last worked as a part-time order pick up and deliver team member. Claimant's job duties included assisting customers with their orders, pulling online orders and preparing them for customer pick up. Claimant was separated from employment on September 20, 2021, when he was discharged.

On September 20, 2021, General Manager, Sam Martin, was at the front desk of the store. A female guest wearing a skirt came to the front desk upset and complained about an employee. The female guest claimed that an employee followed her around the store and she asked him to stop following her. The female guest claimed the employee did not stop following her. The female was reporting this to another store employee and Mr. Martin overheard the exchange.

Mr. Martin then went to the store's video cameras to review the footage to see if he could determine what happened. Mr. Martin reviewed the footage and saw that at approximately 1:21 p.m. the female guest was seen on camera with Claimant. According to Mr. Martin you could see

the female guest and claimant following her in the store. The employer provided five still photographs in Exhibit 2 showing the two parties in proximity to each other. (Exhibit 2). These five photographs display a time beginning 1:21 p.m. through 1:34 p.m. Mr. Martin could not see any verbal exchanges between the two parties. Mr. Martin did not observe any gestures by claimant. Mr. Martin did not observe any physical touching of the parties. Mr. Martin observed that Claimant was in proximity to the female guest for 14 minutes. Claimant's normal job area is in the opposite corner of the store where the camera recorded him.

Two or three months prior to this incident Mr. Martin had previously verbally warned claimant about following females around the store. Mr. Martin did not tell Claimant his job was in jeopardy or that he would be terminated if he continued this behavior.

After performing his investigation Mr. Martin came to the determination to terminate Claimant for this incident based on Claimant's previous verbal warning and the demeanor of the guest as she was complaining. At 1:48 p.m. Mr. Martin drafted a termination letter for claimant stating that he was being terminated for violating policy #6. (Exhibit 1). Mr. Martin determined Claimant harassed a guest because Claimant followed a guest and after she asked him to leave her alone and he continued to follow her. (Exhibit 1).

Employer's policy #6 in relevant part states: "Violation of work regulations can result in various forms of disciplinary action including suspension and termination... The following is a partial list of actions which could result in disciplinary action: "Threats, intimidation, harassment, fighting or physical abuse, and/or the use of profanities or abusive language directed at Customers. Fighting or physical abuse and/or the use of profanities or obscene language directed at Team Members." (Exhibit 4, pg. 14, para. 6). The claimant received a copy of this policy and acknowledged receipt of the policy on July 7, 2020. (Exhibit 4, pg. 18).

Mr. Martin asked Claimant to his office to discuss the incident. Mr. Martin informed Claimant he was being terminated for harassing a female guest. Claimant was unaware what Mr. Martin was referring to and asked Employer to provide him with the proof that he harassed a female guest. Mr. Martin refused to comply with Claimant's request. Claimant denied he harassed any female guest. Mr. Martin terminated Claimant.

Since Claimant was not provided proof at the time of his separation of the conduct he committed he does not know about the incident that led to his separation. Based on reviewing the picture submitted during the hearing Claimant believes he was performing job duties in the pictures. (Exhibit 2). Specifically Claimant believes he was performing online pickup tickets for customers. Mr. Martin investigated the electronic record created when tickets are printed and determined that Claimant was not performing ticket fulfillment work during this time. There were no outstanding tickets that would require claimant to be in the areas of the store where the female guest was located.

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

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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). 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). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy. However, if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

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.*

Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995). In considering whether specific hearsay testimony is "the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs" there are five factors to be considered. *Schmitz v. Iowa Dep't of Human Servs.*, 461 N.W.2d 603, 607-08 (Iowa Ct.App. 1990)(citing Iowa Code § 17A.14(1)). Those factors include: (1) the nature of the hearsay, (2) the availability of better evidence, (3) the cost of acquiring better information, (4) the need for precision, and (5) the administrative policy to be fulfilled. *Id.* at 608.

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 that the employer did not establish job related misconduct that would disqualify Claimant from unemployment benefits. The employer provided hearsay statement through Mr. Martin by a female guest that Claimant was following her around the store. Mr. Martin testified he reviewed the video but he could not establish Claimant spoke to the female guest, made gestures, touched, leered, or made any threats to the guest. Mr. Martin could not determine if the female told Claimant to stop following her. Mr. Martin testified Claimant was in the same area of the store as the female guest for approximately 14 minutes. Employer attempted to prove the harassment by submitting five still photographs in Exhibit 2. The photographs prove Claimant and a female guest were in proximity to each other at least five separate times. These pictures and Mr. Martin's testimony about what he observed on the video do not establish that Claimant harassed a female guest. Furthermore, the employer had the ability to submit the video for the hearing and they chose not to. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative

law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

In this case there was no final act of misconduct that the claimant committed that would disqualify him from receiving benefits. The employer did not meet its burden of proof that claimant was in violation of any rule or policy. As such, employer has failed to prove that claimant was discharged for any current act of job-related misconduct that would disqualify him from receiving benefits. Benefits are allowed.

**DECISION:**

The October 25, 2021, (reference 01) unemployment insurance decision is REVERSED. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



---

Carly Smith  
Administrative Law Judge  
Unemployment Insurance Appeals Bureau

---

January 31, 2022  
Decision Dated and Mailed

cs/kmj