

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**NATHAN A HARRIS**  
Claimant

**APPEAL NO: 17A-UI-12511-TN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**NATIONWIDE OFFICE CLEANERS LLC**  
Employer

**OC: 10/29/17**  
**Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

Nathan A. Harris, the claimant, filed a timely appeal from a representative's unemployment insurance decision dated November 29, 2017, reference 01, which denied benefits finding that the claimant was discharged from work on October 12, 2017 for conduct not in the best interest of the employer. After due notice was provided, a telephone conference hearing was held on December 22, 2017. Claimant participated. Participating as witnesses for the claimant were Mr. Brent Harris, claimant's father and Mr. Chris Warner, former fellow employee. The employer participated by Mr. Scott Thomas, Company Controller. Claimant's Exhibit A was admitted into the hearing record.

**ISSUE:**

Whether the evidence in the record establishes job related misconduct sufficient to warrant the denial of unemployment insurance benefits?

**FINDINGS OF FACT:**

The administrative law judge, having considered all of the evidence in the record, finds: Nathan A Harris was employed by Nationwide Office Cleaners, LLC from June 21, 2015 until October 12, 2017 when he was discharged from employment. Mr. Harris was employed as a full-time window cleaning crew manager and was paid by salary. His immediate supervisors were Mr. Al Shelton and Mr. Cory Shelton.

A decision was made to separate Mr. Harris from his employment based upon two final incidents that had taken place on October 28 and October 29, 2017. On those dates, the employer believed that Mr. Harris had intentionally manipulated his cell telephone and a tracking device supplied by the company to defeat a company installed system which allowed the employer to track Mr. Harris during the work day.

On September 28, 2017, Mr. Harris and the window crew under his supervision were working at a large client location. The claimant placed his personal cell phone with the tracking device on a charger because the telephone was dead. While the cell phone remained on the charger, Mr.

Harris went to other smaller locations to perform work for the company, leaving his cell phone with the tracking device and the charger at the first location.

At the end of the workday, Mr. Sharpton asked the claimant about the reason that the company had been unable to reach Mr. Harris and/or monitor his location by the tracking device that day. Mr. Harris explained and Mr. Shelton reminded the claimant of the company's expectation that supervisors keep cell phones with the tracking devices with them while they perform their duties each day. On September 29, 2017, the employer was unable to locate Mr. Harris during the work day on the tracking device. When questioned, Mr. Harris denied intentionally turning off the tracking device or manipulating it in a way so as to void the telephone's tracking capabilities.

Because the company could not identify whether Mr. Harris had intentionally disabled the tracking portion of the telephone, the company brought the question to the software company that had manufactured the tracking device.

Nationwide Office Cleaners, LLC was informed by the software company that the disabling of the tracking device on Mr. Harris' phone was not because of a malfunction, but because that portion of the application had intentionally been shut off. The company concluded that Mr. Harris had intentionally shut off the device in violation of company policy and a decision was made to terminate Mr. Harris from his employment, however, the claimant was not given a specific reason for his termination at the time of discharge.

In the months preceding Mr. Harris' discharge from employment, the employer had implemented a procedure for tracking management workers via the attachment to cell phones. The company had supplied cell phones with the tracking device to a majority of its supervisory personnel. Mr. Harris had been given a company cell phone with the tracking device for a period of time, but later he was required to return it to another worker. The company authorized Mr. Harris to use his personal cell phone with the employer's supplied tracking app installed on it. The company expected all supervisory personnel to keep a cell phone with the tracking device with them each day during working hours so that the employer could track the location of various crews working in the field. The company had no written policy governing the cell phone/tracking device use or for disciplinary violations of the rule. Information about the cell phone/tracking device use was conveyed to employees verbally. After Mr. Harris was provided a company cell phone for a short period of time, he used his personal cell phone after the company reassigned the company phone that had been given to Mr. Harris. Although the company supplied the tracking application used on Mr. Harris' cell phone, the claimant was responsible for billing, unless he requested that the company pay for any specified billing.

Mr. Harris testified that on September 29, 2017, he had received a notice of data use overcharge from his cell phone provider and that he had temporarily turned off the "data portion" of his phone, so that no more data charges would be billed to his phone for the remainder of the month of September. Mr. Harris testified he was not aware that turning off the data portion of his phone could affect the ability of the cell phone to be tracked by the employer. Because Mr. Harris had not been told the reason he was being discharged, he had not been able to give that information to the employer earlier.

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

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

In this case, the delay between the date of the act and the claimant's discharge took place because the employer was attempting to determine through the software provider whether Mr. Harris may have intentionally shut off the device in question. The delay was reasonable under those circumstances.

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

into the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence that is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

Hearsay is admissible in administrative proceedings, however it cannot be accorded the same weight as sworn firsthand testimony, provided that the first hand testimony is credible and is not inherently improbable. The employer in this case has offered hearsay testimony about the rule, its application, warnings served on Mr. Harris, and the final incident which resulted in Mr. Harris' discharge from employment. In contrast, the claimant appeared personally, testified under oath, and provided first hand testimony. After questioning the claimant at length, the administrative law judge finds that the claimant's testimony is credible and not inherently improbable.

The administrative law judge concludes that the claimant was not given adequate information about the company's expectations for the use of its tracking devices on his cellular telephone. The record does not establish that Mr. Harris was adequately warned about the rule and potential consequences for violating the rule in the future. The evidence in the record does not establish intentional job related misconduct sufficient to deny unemployment insurance benefits.

The question in this case is not whether the employer had a right to discharge Mr. Harris for the above stated reasons, but whether the discharge disqualifying under the provisions of the Iowa Employment Security Law. Although the decision to terminate Mr. Harris may have been a sound decision from a management viewpoint, the administrative law judge concludes the claimant was discharged under non-disqualifying conditions. Accordingly, the claimant is eligible to receive unemployment insurance benefits, provided that he meets all the eligibility requirements of Iowa law.

**DECISION:**

The representative's decision dated November 29, 2017, reference 01 is reversed. Claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

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Terry P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

tn/scn