

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

GERALD E LENERTZ
Claimant

PRO COOPERATIVE
Employer

APPEAL 17A-UI-12563-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/05/17
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 27, 2017, (reference 01) unemployment insurance decision that denied benefits based on his discharge for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on December 28, 2017. The claimant participated and testified. The employer participated through Human Resource Manager Ofelia Rumbo and Location Manager Duane Brown. Claimant's Exhibit A was received into evidence.

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: Claimant was employed full time as an operations worker 1 from February 11, 2013, until this employment ended on November 4, 2017, when he was discharged.

On November 2, 2017, claimant got into a disagreement with a coworker, Fernando. According to claimant the disagreement started when Fernando began harassing and tormenting him by repeatedly telling him he was going to have to work late. According to Brown the disagreement began as a verbal altercation, but ending with some shoving. Following this disagreement Fernando, who is a migrant worker employed on contract, called his contract company and reported the incident. The contract company then phoned Rumbo. Rumbo was told Fernando reported claimant had gotten physical with him, used racial slurs towards him (Fernando is Latino), and he was now afraid to ride to and from work with claimant as he had been. Around this same time claimant spoke with Brown, reporting that Fernando had been harassing him.

On November 3, 2017, the employer began investigating the situation. The investigation started with individual interviews of claimant and Fernando, as well as the supervisor on duty. The supervisor on duty reported he did not see anything and the entire incident must have occurred while he was away for a few minutes. A meeting was then held with several members of

management, claimant, and Fernando. Brown testified, during this meeting, claimant used racial slurs combined with profanity directed at Fernando. According to Brown claimant was read the employer's harassment and discrimination policy and told the employer has zero tolerance for harassment. (Exhibit A, page 18). Brown testified the behavior continued and claimant was subsequently discharged for violating the policy. During the hearing claimant denied using any racial slurs or profanity. Claimant acknowledged receiving the employee handbook and being told to read it, but testified he did not ever read the harassment policy. Claimant denied anyone read the harassment policy to him until he was discharged on November 4.

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).

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. Claimant insists he did not make any racial slurs or use profanity towards Fernando. However, during the hearing claimant unnecessarily used an offensive accent to mimic Fernando's speech, insinuated on more than one occasion that migrate workers are all undocumented, and testified he assumed no written statement was taken from Fernando because he could not read or write in English. While claimant may not believe his conduct is offensive or racially biased, it is nevertheless inappropriate and lends credibility to the employer's testimony regarding his behavior and comments during the investigation.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer also has an interest and duty in protecting the safety of all of its employees. Finally, the employer is required to follow State and Federal laws prohibiting harassment in the workplace based on protected characteristics, such as race, color, and ethnicity. The employer has presented substantial and credible evidence that claimant engaged in race-based harassment and continued to engage in such behavior after having been warned his conduct violated the employer's zero tolerance harassment policy. Claimant's conduct shows a deliberate disregard for the employer's interest and is disqualifying misconduct.

DECISION:

The November 27, 2017, (reference 01) 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.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs