

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JOEL M PERGANDE
Claimant

OGDEN NEWSPAPER OF IOWA INC
Employer

APPEAL 15A-UI-13387-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/08/15
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 2, 2015, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified and a hearing was held on December 23, 2015. Testimony was completed at a second hearing on December 29, 2015. The claimant participated personally in the hearings, and was represented by Becky Finch, mother of the claimant. The employer was represented by Terry Christensen, General Manager. Ruth Shoars and Randy Smith also testified on behalf of the employer. Claimant Exhibit A was admitted 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: The claimant was employed full time as a press assistant and was separated from employment on November 11, 2015, when he was discharged.

The final incident occurred on November 10, 2015 when a press stopped working, which upset the claimant, and he smacked the switches on the press so they broke. The claimant admitted to management that he was mad, when confronted, and walked away. The claimant did not complete his shift and did not have permission to leave, but determined he was too upset to continue working and left the premises. The claimant notified his manager, Randy Smith, via voicemail that he was mad and not going to finish his shift, and also made a second attempt to reach Mr. Smith later that day. He was subsequently discharged.

The undisputed evidence is that the claimant could satisfactorily perform the work and had done so throughout the course of employment. Prior to the claimant's discharge, he had been issued a one-day suspension on November 6, 2015, for taking excessive breaks. On November 9, 2015, the employer met with the claimant and identified thirteen incidents that had occurred with him since February, including extended lunches, excessive breaks, and tardiness. Mr. Smith

reported that the claimant was not disciplined for any long lunch or break that he (Mr. Smith) requested employees take to accommodate business needs.

At the hearing, it was asserted that Mr. Smith singled out the claimant and had routinely harassed him with comments about his personal life and drinking. The most recent comment the claimant referred to was references of being a “pothead” about five months prior to discharge. Mr. Smith acknowledged he believe the claimant’s personal drinking affected his work performance if he missed work or was hung over, but did not discipline for it, and indicated it was not his decision, but Mr. Christensen’s choice to discharge the claimant.

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 § 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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). Generally, continued refusal to follow reasonable instructions constitutes misconduct. Gilliam v. Atlantic Bottling Co., 453 N.W.2d 230 (Iowa Ct. App. 1990).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

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, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer has met its burden of proof to establish the claimant was discharged for disqualifying job-related misconduct.

In this case, the claimant was issued a suspension on November 6, 2015 and had a review with the employer on November 9, 2015, identifying thirteen different issues that occurred since February 2015, including leaving the premises without permission, tardiness, and taking extended and excessive lunches and breaks to smoke. The claimant was aware his job was in jeopardy. Based on the evidence presented, the claimant was not disciplined for extended lunches or breaks directed by the employer, or that Mr. Smith intentionally bullied him or singled him out for discipline or discharge.

On November 10, 2015, the claimant broke the employer's machine when he hit or smacked buttons on a machine, admitted he was mad and then left his shift without permission. It is understandable that the claimant may have been upset or frustrated by the press not working correctly, but does not negate the fact the claimant had a history of discipline issues, which included leaving the premises without permission, or the fact he physically damaged the employer's property in response to being upset. The claimant knew or should have known his conduct was in disregard of the employer's interests and reasonable standards of behavior that the employer has a right to expect of its employees. Benefits are withheld.

DECISION:

The December 2, 2015, (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.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

jlc/css