

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**ROBERT S KEPHART**  
Claimant

**APPEAL 18A-UI-09523-AW-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TOP GUN PAINTING LLC**  
Employer

**OC: 12/17/17  
Claimant: Appellant (2)**

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Iowa Code § 96.5(2) – Discharge for Misconduct  
Iowa Admin Code r. 871-24.32 – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Robert Kephart, Claimant, filed an appeal from the September 5, 2018, (reference 02) unemployment insurance decision that denied benefits because claimant was discharged from work with Top Gun Painting, LLC for insubordination. The parties were properly notified of the hearing. A telephone hearing was held on October 1, 2018 at 3:00 p.m. Claimant participated. Witnesses for claimant included Dave Wilderom and Rod Perkins. Employer participated through Rowdy Nail, owner. Claimant's Exhibit A was admitted.

**ISSUE:**

Whether Claimant's separation was a discharge 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 a painter with Top Gun Painting, LLC from May 12, 2018 until his employment ended on August 14, 2018. (Claimant Testimony) Claimant previously worked for employer in 2017. (Claimant Testimony) Claimant's direct supervisor was Lance Nail. (Claimant Testimony)

Claimant threatened to quit his job with employer numerous times – usually after being chastised to get back to work or to quit talking with co-workers. (Nail Testimony) Claimant was not told that if he threatened to quit again that he would be fired. (Nail Testimony) On August 14, 2018, claimant again threatened to quit his job. (Nail Testimony) On this occasion, employer discharged claimant. (Nail Testimony)

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed provided claimant is otherwise eligible.

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 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

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.

Further, 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). 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. 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).

What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). However, "Balky and argumentative" conduct is not necessarily disqualifying. *Endicott v. Iowa Dept. of Job Service*, 367 N.W.2d 300, 303 (Iowa Ct. App. 1985)(citation omitted).

It is the duty of the administrative law judge, as the trier of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. While employer's representative was hostile during the hearing, I find the employer's version of events to be more credible than the claimant's version of those events. Claimant denied doing side work at the fact-finding interview, but submitted evidence of side work as an exhibit in the appeal. See Exhibit A. Claimant's statement that he was not attempting to deceive the fact-finder but was merely flustered is not credible. Claimant was asked about doing side work several times and denied it each time. In addition, claimant testified that he never threatened to quit work; this was contradicted by claimant's own witness. Claimant was not credible.

Notwithstanding claimant's lack of credibility, the employer still bears the burden of proof to establish disqualifying, job-related misconduct; and employer has not met its burden. Claimant's threats to quit his job when reprimanded can best be described as "balky and argumentative" conduct; claimant's threats to quit do not rise to the level of substantial misconduct. Because employer has not met its burden of proof to establish disqualifying, job-related misconduct, benefits are allowed provided claimant is otherwise eligible.

**DECISION:**

The September 5, 2018, (reference 02) unemployment insurance decision is reversed. Benefits are allowed if the claimant is otherwise eligible.

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Adrienne C. Williamson  
Administrative Law Judge  
Unemployment Insurance Appeals Bureau  
Iowa Workforce Development  
1000 East Grand Avenue  
Des Moines, IA 50319-0209  
Fax: 515-478-3528

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Decision Dated and Mailed

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