IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SCOTT A GRAHAM Claimant **MENARD INC** Employer	**APPEAL NO. 23A-UI-06745-JT-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/04/23** **Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) – Discharge

STATEMENT OF THE CASE:

On July 5, 2023, Scott Graham (claimant) filed a timely appeal from the June 28, 2023 (reference 01) decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on May 26, 2023 for violation of a known company rule. After due notice was issued, a hearing was started on July 25, 2023 and concluded on July 28, 2023. Claimant participated personally was represented by attorney James Ballard. Paul Hammel represented the employer and presented testimony through Justin Cue. Exhibits 1 through 12 and A through F were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Graham Scott (claimant) was employed by Menard, Inc. as a full-time Plumbing and Sales Team Member at the Menards store in Des Moines from 2013 until May 26, 2023, when the employer discharged him from the employment for alleged insubordination. Most of the claimant's plumbing department duties required that the claimant stand and walk. A small portion of the claimant's daily work duties could be performed while seated. Ben Watson, Plumbing Department Manager, was the claimant's immediate supervisor. Justin Cue is First Assistant General Manager at the Des Moines store. The claimant worked an eight-hour shift. Pursuant to the employer's standard break policy, employees who work an eight-hour shift are entitled to two paid 15-minute breaks and an unpaid 30-minute meal break. Pursuant to the policy, employees are required to clock out for the unpaid lunch break. The break policy was set forth in an employee handbook. The claimant signed to acknowledge the handbook at the start of the employment. The claimant asserts he never read the handbook. The claimant was at all relevant times aware of the standard break policy.

The claimant suffered a workplace back injury in 2016, when he fell from an eight-foot ladder while retrieving merchandise totes from a shelf. The claimant's injury gave rise to a worker's compensation claim. The claimant was initially off work for six weeks. The claimant then returned to work with medical restrictions. The claimant continued to have work-injury-related medical restrictions until the end of the employment. In January 2021, the claimant underwent back surgery related to the workplace injury. By January 2022, the claimant had reached maximum medical improvement (MMI).

From January 2022 until the end of the employment, the claimant had the same or similar medical restrictions. The claimant was to sit as needed to decrease time standing on the concrete floor and to diminish lower back spasms. In response to the employer's request for clarification, the medical provider stated the claimant was to use a seat with a back rest or an upside down five-gallon bucket to rest his back. The claimant used the bucket when performing work in the plumbing department aisles. The claimant used a shopping cart when he needed to transport items in the workplace.

The claimant could have taken over-the-counter pain medication to assist with the back pain issues, but generally elected not to take such medications in connection with his work.

Toward the end of the employment, the claimant continued to experience significant work-related back pain issues that prompted outpatient nerve cauterization on April 25, 2023. The claimant returned to work under the same medical restrictions following the medical procedure.

The claimant and his supervisor found what they thought was an appropriate spot in the plumbing department where placement of a resting chair for the claimant would work without interfering with the flow of business. However, Mr. Cue, First Assistant General Manager, prohibited the claimant from having and using a chair in the plumbing department. Mr. Cue was of the opinion that use of a chair in the department would not look good to customers, would use too much space, and would interfere with customers moving through store aisles. Mr. Cue restricted the claimant to using an upside-down five-gallon bucket for sitting within the department. The five-gallon bucket was a half-measure that provided no back support when the claimant needed to rest his back. If the claimant needed a chair with a back support to address pain or back spasms, Mr. Cue's prohibition against having a chair in the plumbing department made it necessary for the claimant to leave the department to use a chair in a different area of the workplace. During these sedentary resting periods, the claimant would generally perform sedentary work or review work-related instructional videos that would help him better serve customers.

The employer tolerated the claimant's need for extended resting periods for his back pain issues until mid-February 2023. Mr. Cue elected to substantially change his approach to the claimant's need for workplace accommodations in in February 2023, after the employer noted the claimant nodding off while seated at a desk.

On February 11, 2023, the claimant sat at a desk from 8:26 a.m. to 9:07 a.m., for a total of 41 minutes. Though the claimant performed some work while seated, he also checked his personal cell phone.

On February 12, 2023, the claimant sat at a desk from 2:42 p.m. to 3:30 p.m., for a total of 52 minutes. This is when the employer noted the claimant dozing. The claimant had dozed while watching an instructional video.

After the dozing incident, the employer told the claimant he would need to commence clocking out for all of his medical restrictions related resting periods, which the employer considered extended breaks and outside the standard break policy. Though Mr. Cue asserts he wanted the claimant to clock out so that the worker's compensation carrier, rather than the employer, could compensate the claimant during the resting time, Mr. Cue never addressed the matter with the worker's compensation carrier. Nor did anyone discuss such compensation with the claimant. Mr. Cue had no knowledge concerning whether the worker's compensation carrier had agreed to compensate the claimant for time the claimant rested his back while at work. The claimant understood the employer's directive to clock out during back resting periods to be a directive that the claimant forego pay during these sedentary periods and was opposed to the notion that he go without pay.

On February 13, 2023, the employer issued a written reprimand to the claimant. The employer wrote:

> Scott will be issued a 1 day suspension for dozing off on [sic] while being punched in. Scott will also follow Policy and punch out for any and all breaks (meal, rest, medical, personal). Failure to do so will result in further disciplinary action up to and including suspension.
>
> Suspension day will be served Friday, February 17th.

The claimant marked "Refused SG" on the signature line to indicate that he disagreed with the reprimand. On April 12, 2023, the claimant sat at a desk from 3:56 p.m. to 4:36 p.m., for a total 40 minutes. The claimant did not clock out.

On April 12, 2023, the employer issued a written reprimand to the claimant. The employer wrote: "Scott needs to be following Policy and punching out for any and all types of breaks. Further instances of this nature will result in suspension or termination." The claimant added the following comment: "I am following Dr Smith Restrictions." The claimant signed his first name next to his comment. The claimant marked Refused SG on the signature line to indicate that was refusing to sign the reprimand.

On April 19, 2023, the claimant sat a desk from 2:35 p.m. to 6:26 p.m., for a total of an hour and 51 minutes. The claimant did not clock out.

On April 21, 2023, the employer issued a written reprimand that the claimant refused to sign. The employer wrote:

> Scott needs to follow P/P and punch out for breaks. This has been explained to him multiple times. There is no reason for Scott to be out of his home department for this amount of time. Scott will punch out for these rest time[s] he is taking for he will be terminated.

Between the time of the claimant's nerve cauterization in April and the end of the employment, the employer moved some of the "back office" chairs the claimant would use for his back resting periods and thereby made them unavailable to the claimant.

The final incident that triggered the discharge occurred on May 26, 2023, when the claimant sat at a desk from 12:20 p.m. to 1:36 p.m., an hour and 16 minutes. The claimant did not clock out. The claimant performed work while seated, but the employer deemed the sedentary period a break. The employer again told the claimant he would need to commence clocking out for all back resting time. The claimant again declined to go without pay during these sedentary

periods. The employer issued a written reprimand and discharged the claimant from the employment that same day.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) and (d) provides as follows:

> 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.
> …
> d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:
>
> > …
> > (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
> > …
> > (14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> a. For the purposes of this rule, "misconduct" is defined as a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 a 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. Misconduct by an individual includes but is not limited to all of the following:
> …
> (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
> …

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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).

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. See Iowa Administrative Code rule 871-24.32(4).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. *See Endicott v. Iowa Department of Job Service,* 367 N.W.2d 300 (Iowa Ct. App. 1985). In *Gilliam v. Atlantic Bottling Company*, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990).

The evidence in the record establishes a discharge for no disqualifying reason. All of the incidents that factored in the discharged occurred in the context of the claimant's ongoing medical need for reasonable accommodations in the context of a workplace injury. The employer's prohibition against having a chair in the plumbing department where the claimant could rest his back but continue to perform his duties and remain available to customers and staff was an unreasonable directive under the circumstances and contributed to the concerns that followed. This employer directive compelled the claimant to leave the department if he needed to rest his back. The directive limited the amount of work the claimant could perform and made the claimant less productive. The employer directive created the difficulties the employer encountered in discerning whether the claimant was legitimately resting his back versus other taking a break under the standardized break protocol. The employer's requirement from February 2023 onward that the claimant clock out for each back resting period was also an

unreasonable directive under the circumstances. Under the circumstances, the claimant's refusal to clock for the back resting periods was reasonable. The claimant's need for sedentary resting periods in connection with the ongoing work-related medical condition was clearly a matter outside the employer's standard break structure. The evidence indicates the longer resting periods occurred within weeks of the nerve cauterization procedure, which procedure was by itself an indication that the claimant was in significant ongoing pain. While the employer suspected the claimant was not engaged in work during some portion of one or more of the sedentary periods, the employer presented insufficient evidence to prove a knowing, intentional violation of a reasonably applied work rule or other willful and wanton disregard of the employer's interests. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The June 28, 2023 (reference 01) decision is REVERSED. The claimant was discharged on May 26, 2023 for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

James E. Timberland
Administrative Law Judge

08/08/23
Decision Dated and Mailed

JET/jkb

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:
1) The name, address, and social security number of the claimant.
2) A reference to the decision from which the appeal is taken.
3) That an appeal from such decision is being made and such appeal is signed.
4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at https://www.legis.iowa.gov/docs/code/17A.19.pdf.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:
A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:
1) El nombre, dirección y número de seguro social del reclamante.
2) Una referencia a la decisión de la que se toma la apelación.
3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en https://www.legis.iowa.gov/docs/code/17A.19.pdf.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:
Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.