

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ETHAN S GERHARDT
Claimant

APPEAL NO. 13A-UI-07512-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LANCE PRIVATE BRANDS LLC
Employer

**OC: 05/26/13
Claimant: Appellant (2)**

Section 96.5(2)a – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant, Ethan Gerhardt, filed an appeal from a decision dated June 13, 2013, reference 01. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on July 30, 2013. The claimant participated on his own behalf. The employer, Lance Private Brands, participated by Human Resources Assistant Janet Bowen. Exhibit D-1 was admitted into the record.

ISSUE:

The issue is whether the appeal is timely and whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits..

FINDINGS OF FACT:

A disqualification decision was mailed to the claimant's last known address of record on June 13, 2013. The claimant maintained he had never received the decision. He waited two weeks after the fact-finding interview to contact Iowa Workforce Development to inquire as to the result and was told he had been disqualified.

Ethan Gerhardt was employed by Lance Private Brands from July 9, 2009 until May 28, 2013 as a full-time machine technician. He received a copy of the employee handbook. One of the general manufacturing policies prohibits the use of cell phones on the production floor.

On October 18, 2012, the claimant received a written warning for a safety violation and was notified if there were any further safety violations he would be discharged. On May 23, 2013, he was seen using his cell phone on the production floor. He was discharged by phone on May 28, 2013, by Human Resources Director Karen Taylor for a safety violation in using his cell phone.

The employer's witness did not know whether Mr. Gerhardt was interviewed about the incident prior to the employer notifying him he was fired. At the appeal hearing the claimant stated he had permission from his supervisor to use the cell phone as long as he was using it in his work.

He maintained he was using it to check the date to write down on documentation and to calculate certain weights and measures.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides in pertinent part:

The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. . . . Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision.

The administrative law judge will accept the appeal as timely as there is no evidence to rebut the claimant's assertion he did not receive the decision.

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.

The employer has the burden of proof to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The employer could not establish whether the claimant's assertion he had the permission of his supervisor to use the cell phone for business purposes was made before the firing, or whether it was investigated before the discharge. In addition, the employer could not establish that the use of cell phones on the production floor was listed under "safety violations" in the handbook and therefore would be grounds for discharge under the previous warning.

If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The employer has not carried its burden of proof to establish that the claimant committed any act of misconduct in connection with employment for which he was discharged. Misconduct has not been established. The claimant is allowed unemployment insurance benefits.

DECISION:

The decision of the representative dated June 13, 2013, reference 01, is reversed. Ethan Gerhardt is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css