

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

STEVEN J VARGAS
Claimant

HY VEE INC
Employer

APPEAL 16A-UI-05711-DB
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/24/16
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the May 11, 2016 (reference 01) unemployment insurance decision that disallowed benefits based upon claimant's discharge from employment for job-related misconduct. Due notice was issued for the hearing. The claimant, Steven J. Vargas, participated personally and through witness Daniel A. Vargas. The employer, Hy-Vee, Inc., participated through Hearing Representative Bruce Burgess; Manager of Perishables Marcie Neuhalfen; and Assistant Manager Ben Lawson. Employer's Exhibits One and Three were admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as a checker and clerk from February 25, 2014 until April 25, 2016. Claimant's job duties included customer service, stocking shelves with product, cleaning, and other various duties.

The employer has written corporate policies regarding an employee's code of conduct. See Exhibit Two. One of the policies states that you must scan out or clock out if you leave the premises for non-employment purposes. See Exhibit Two. Further, employees may not alter, falsify, or otherwise tamper with time records, including recording time for another employee. See Exhibit Two.

The store located in Perry, Iowa also has its own local store policies. Claimant received a copy of the corporate company policies on February 25, 2014. See Exhibit Two. Claimant also received a copy of the local store policies. The store located in Perry, Iowa has a verbal policy that employees are not allowed to smoke cigarettes on company property unless they are in their personal vehicle. The store located in Perry, Iowa also has a policy that if an employee wants to leave the store they need to have a direct supervisor's permission and they need to be clocked out for a full 30 minutes.

On April 23, 2016, claimant was observed by Mr. Lawson coming in the back door. Claimant had been taking a break and was smoking near the loading dock on company property. Prior to claimant taking his break, he had asked his immediate supervisor, Mallory Delp, if he could take a break and was told he could not. He took a break anyway so that he could have a cigarette. Mr. Lawson checked claimant's timecard when for when he was outside on break smoking and he had not clocked out. When claimant came into the building and was questioned about why he was outside, claimant lied to Mr. Lawson about looking for product for a customer.

Mr. Lawson brought this matter to Ms. Delp's attention immediately after he discovered that claimant had not clocked out for the break. Upon learning that claimant had disregarded her instructions not to take a break, had not clocked out while on break, and had smoked a cigarette on company property, Ms. Delp wrote claimant up on a consultation form and sent him home early. Ms. Delp then reported claimant's behavior to Ms. Neuhalfen.

Prior to this incident claimant had received written reprimands for similar conduct. On December 31, 2015, claimant had engaged in the exact same conduct. On this date he asked his supervisor Nancy Polenchock if he could take a break and was told that he could not. He left the store anyway and had a cigarette outside on company property without clocking out. He was given a written warning for this conduct. See Exhibit One.

On December 19, 2015, claimant received a written warning for failing to report for his shift or notify the employer that he would be absent. See Exhibit One. On October 12, 2015 and October 29, 2015, claimant was given a written warning for failing to stay clocked out for 30 minutes while taking a break. This written warning stated that if the problem persists it could result in termination. See Exhibit One.

On April 25, 2016, Ms. Neuhalfen discharged claimant from employment for the incident that occurred on April 23, 2016. When she asked claimant why he took a break when he was instructed not to do so, he replied that he wanted a cigarette. Claimant contends that other employees, including supervisors, smoke on company property and not in their personal vehicles and have not been discharged for doing so.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct. Benefits are denied.

As a preliminary matter, I find that the claimant did not quit. Claimant was discharged from employment.

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.

Iowa Admin. Code r. 871-24.32(1)a and (4) 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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

(4) Report required. The claimant's statement and the 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.

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). 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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Further, 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 law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

This was not one single act of misconduct. The employer had specific policies that stated that an employee must get permission from a supervisor prior to taking a break. Claimant was specifically told that he could not take a break at that time but did so anyway. The purpose of the break was so claimant could smoke a cigarette. This was not an emergency situation.

Further, claimant did not clock out for his break, in violation of the employer's written policy. Claimant understood that he needed permission to take a break from a supervisor and that he needed to clock out for thirty minutes if he was taking a break. This is evident from the previous discipline claimant had regarding the same conduct and claimant's own testimony.

Claimant had been previously warned for this same conduct approximately four months prior to this final incident and was on notice that he needed to comply with the company policies or he would be subject to discharge. Even with this awareness claimant chose to disregard his supervisor's clear instructions and further failed to follow the employer's policy in clocking out while on break. The supervisor's instructions were reasonable. Claimant's excuse for not following his supervisor's instructions is unreasonable.

Claimant's continued actions of failing to follow his supervisor's instructions and failing to clock out for a full thirty minute time period for a break constitutes an intentional and substantial disregard of the employer's interest. Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Insubordination does not equal misconduct if it is reasonable under the circumstances. The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa App. 1985). This was not an emergency situation that the claimant needed to attend to. The supervisor's request to not take a break at that specific time was reasonable and claimant failed to follow the instructions of his supervisor. As such, benefits are denied.

DECISION:

The May 11, 2016 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for 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.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/can