

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JOSEPH SCHMIDT
Claimant

ABRH LLC
Employer

APPEAL 16A-UI-12645-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/23/16
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the November 16, 2016, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 14, 2016. The claimant participated personally. The employer participated through Susen Zevin, hearing representative with Talx. Shannan Seng, manager, also testified for the employer. Employer Exhibit 1 was admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

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 cook and was separated from employment on October 25, 2016, when he was discharged.
On the claimant's final day of employment, October 23, 2016, he was having a bad day, and was observed by Ms. Seng "banging around" the kitchen. The claimant was upset because he was swamped by orders, and had received text messages from his grandmother (about his grandfather who had just had surgery after a motorcycle accident) and another girl (who he stated was no longer in his life). The claimant acknowledged he should not have been looking at his cell phone while on the clock, but that most employees did. As a result of the busyness and messages, he also was heard by Ms. Seng saying that he was having a "bad fucking day". She pulled him off the kitchen line to discuss and suggested he go home, to which he agreed. He was subsequently discharged on October 25, 2016.

Prior to the final incident, the claimant had been trained on company policies and procedures. The employer did not present any policies or procedures related to the claimant's conduct or any written warnings. The employer was unable to identify a specific policy regarding language in the workplace but Ms. Seng asserted she had disciplined others for profanity. The claimant won employee of the quarter in 2016, and approximately two weeks before, had been issued a written warning after smoking marijuana outside the employer's facilities, while off duty, and visiting to pick up his paycheck. He had no other warnings and was unaware his job was in jeopardy. Ms. Seng discharged him due to his "downward spiral", taking into account the smoking incident and his outburst on October 23, 2016.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$249.00, since filing a claim with an effective date of November 16, 2016. The administrative record also establishes that the employer did participate in the November 15, 2016 fact-finding interview by way of Shannan Seng.

REASONINGS AND CONCLUSIONS OF LAW:

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

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 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).

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).

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). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990)

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.* Assessing the credibility of the witness and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for a current act of work-connected misconduct as defined by the unemployment insurance law.

The credible evidence presented was the claimant had no prior warnings for unprofessionalism or language or conduct in the workplace. Rather, the employer issued a written warning and allowed the claimant to continue working after once observing him smoking marijuana outside employer premises, while he was visiting to pick up his paycheck and off duty. The claimant had also recently won the employee of the quarter. While the administrative law judge does not condone the claimant's use of telling his manager he was "having a bad fucking day", there is no evidence that the claimant used profanity at management, loudly in the presence of customers or otherwise caused some disruption in the workplace. Rather, the claimant was overwhelmed by his personal life and the busy rush in the kitchen and responded when asked by Ms. Seng. He did not curse at her, or call names, or make any threats.

For these reasons, the administrative law judge concludes the claimant's use of profanity in the kitchen with Ms. Seng was an isolated incident of poor judgment and inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and

reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. A warning for smoking on company property is not similar to profanity and the employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined. The claimant may have had good business reasons to discharge the claimant, but misconduct as defined by Iowa unemployment insurance law, has not been established. The claimant is allowed benefits, provided he is otherwise eligible for benefits.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

DECISION:

The November 16, 2016, (reference 02) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not relieved of charges associated with this claim.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs