

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL L ATHENS
Claimant

APPEAL NO. 12A-UI-06187-H2

**ADMINISTRATIVE LAW JUDGE
DECISION**

FOODS INC
Employer

OC: 04-15-12
Claimant: Appellant (1)

Iowa Code §96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the May 14, 2012, reference 01, decision that denied benefits. After due notice was issued, an in person hearing was held on June 20, 2012 at Des Moines, Iowa. The claimant did participate and was represented by Bruce H. Stoltze, Attorney at Law. The employer did participate through Mark Pierson, Store Director and was represented by Russell L. Samson, Attorney at Law.

ISSUE:

Was the claimant discharged due to job connected misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a meat merchandiser full time beginning October 20, 2008 through April 16, 2012 when he was discharged.

On Saturday April 14 at 8:00 p.m. the Dahl's store where the claimant worked lost power. The management team all returned to the store after learning of the power outage. After contacting Mid-American Energy Mr. Pierson learned that it would quit awhile before the power was restored to the store. Because grocery stores rely on power to keep products frozen, fresh or chilled, the loss of electricity for an unknown time was considered an emergency. Without power the employer risked losing hundreds of thousands of dollars in frozen and chilled food. At the main store the employer keeps a pallet of dry ice on hand for just such an emergency. Mr. Pierson made arrangements for an employee to pick up the dry ice then contacted the dry ice company to arrange for delivery of four additional pallets of dry ice to be delivered to the store.

Mr. Pierson determined that all of the meat in the store needed to be pulled from the shelves and coolers, boxed up and moved to the Waukee store to protect it from spoiling. The claimant was not in the store working when this occurred. Mr. Pierson and others worked until approximately 2:00 a.m. putting as much product in the cooler as possible, covering with plastic wrap and dry ice the other products. The store was shut down from the time they lost power.

Mr. Pierson returned to the store at 5:00 a.m. He was told by the power company that it could be up to another twelve hours before electricity could be restored to the store. As employees arrived at the store to begin working, Mr. Pierson told each of them what had occurred and had them return home. None of the telephones in the store worked and Mr. Pierson was using his own personal cell phone to stay in contact with the power company, the management team and with the dry ice company. Mr. Pierson did not have the opportunity to call each employee and tell them not to come to work. When the claimant arrived at work he, like every other employee that morning, was told to return home and that he would be notified when the power was back on and he could return to work. There was nothing for employees to do in the store while the power was out. While the claimant wanted to clean, Mr. Pierson determined he was too costly an employee to allow to clean and the claimant was instructed to go home until the power could be restored and the store reopened.

Power was returned to the store at about 10:30 a.m. on Sunday morning April 15. The store reopened and the claimant, along with the other employees, was called to come back into work at 11:00 a.m. The claimant's scheduled shift was to end at 3:30 p.m. that day. The claimant went with the store manager to the Waukee store to retrieve the meat that had been stored there. At that time the employer had to restock the meat, produce, and dairy and frozen food departments. That procedure was so vast that employees from other stores were called in to help put the store back together. The employer had no bakery items and very little deli to offer for sale that day. The café was not open at all.

The claimant left early on April 15 at 3:00 p.m. before the end of his scheduled work shift at 3:30 p.m. The claimant could have worked his scheduled shift and additional hours as there was much to do to get the store back into operating condition. The claimant chose to leave early. On Sunday the meat manager, Cliff Nelson, told the claimant how he wanted the meat cut and the meat counters stocked for the day. It was up to the meat manager to decide how the service counter should be stocked. The claimant was asked to cut meat for the service case in the manner Mr. Nelson wanted but did not do so. The claimant had demonstrated an ability in the past to follow orders of the manager and to cut meat and fill the service case as Mr. Nelson wanted.

On Monday morning, April 16 Mr. Pierson was in the meat department speaking to Mr. Nelson about how the meat department was recovering after the power outage when Mr. Nelson reported to him that the claimant had not cut the meat and filled the service counter as he had been instructed to the day before. Mr. Pierson planned to speak to the claimant about his failure to follow Mr. Nelson's instructions. The claimant was scheduled to start work that day at 7:00 a.m. Mr. Pierson asked Mr. Nelson where the claimant was and the claimant answered him as he was walking up the aisle by saying, "[h]ere I am." Since it was 7:15 a.m., Mr. Pierson said to the claimant, "[y]ou're late" and the claimant replied by saying, "I'm here now." Mr. Pierson told the claimant that since he was late he was going to work 8:00 a.m. until 5:00 p.m. that day not 7:00 a.m. to 4:00 p.m. as had been scheduled. Mr. Pierson as the store director had the authority to change any employee's hours and had done so in the past. As the store director Mr. Pierson also had the authority to impose discipline on employees who violated rules including those who were tardy to work. The claimant told Mr. Pierson that he had an appointment and could not work until 5:00 p.m. Mr. Pierson then told him he could leave at 4:00 p.m. and the then claimant complained and began to argue with Mr. Pierson that his hours for the day were being cut. The claimant complained that Mr. Pierson had cut his hours from the day prior when the store was closed due to the power outage. The claimant left early the day prior but could have worked until the end of his shift if he had wanted to and could have worked additional hours because there was so much work to do in the store getting it back in shape. Mr. Pierson would have allowed the claimant to work extra hours on April 15, but the

claimant chose not to make up hours or even work all his hours he had originally been scheduled to work. The claimant was upset that the day prior Mr. Pierson had not let him work performing cleaning duties that he wanted to perform when the store had no power and no meat to sell and no customers were allowed into the store. Mr. Pierson told him that if he was going to argue with him, he could take the day off. The claimant continued to argue becoming more agitated, heated and upset. The claimant continued to object and argue and Mr. Pierson told him that if he continued to argue with him he was going to be discharged on the spot. Mr. Pierson then told the claimant to go see Mike Hoffman, the head of all the meat departments for all the stores because he was no longer going to be allowed to work at Mr. Pierson's store.

In the past the claimant and Mr. Nelson had often disagreed about how much meat should be cut and placed into the service counter. It was up to Mr. Nelson as the meat department manager to make the decision about how the meat service counter should be filled. Mr. Pierson had spoken to both of them individually in the past about their philosophical disagreement about how much meat should be in the case. Mr. Pierson agreed with Mr. Nelson's philosophy about how much meat should be in the meat counter and not with the claimant. The claimant simply wanted to do things the way he thought best despite being instructed otherwise by both Mr. Nelson and Mr. Pierson on prior occasions.

After the claimant left the store, Mr. Pierson called Mr. Hoffman to tell him that he had sent the claimant over to see him. Mr. Pierson explained to Mr. Hoffman what had occurred. Mr. Hoffman said he would not move the claimant to any other Dahl's store and Mr. Pierson determined to discharge the claimant because he was not going to have him back working for him based upon his argumentative behavior and failure to follow instructions of Mr. Nelson about stocking the meat case.

The claimant returned to the store later the afternoon after speaking to Mr. Hoffman himself and said to Mr. Pierson "if I offended you today, I want to apologize." Mr. Pierson did not believe the claimant was apologizing as he did not acknowledge that he had done anything wrong.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). In the past the claimant had failed to follow Mr. Nelson's specific explicit instructions on how he wanted the meat counter stocked. The claimant knew that it was up to Mr. Nelson to decide how to stock the meat case and the claimant intentionally chose not to follow Mr. Nelson's instructions. It was not up to the claimant to substitute his judgment for what was best for that of Mr. Nelson. The claimant on occasion told other subordinate employees how to do their jobs and what they were to do and he expected them to follow his instructions. The claimant repeatedly failed to follow Mr. Nelson's instructions despite being told to do so by Mr. Pierson. When the claimant arrived at work on April 16 Mr. Nelson was reporting to Mr. Pierson that the day prior the claimant had failed to follow his instructions on how to stock the meat case. The claimant was going to be disciplined for his failure to follow Mr. Nelson's instructions when he began to argue with Mr. Pierson about his tardiness to work. The employer was allowed to discipline an employee for being tardy to work.

The claimant was admittedly tardy on April 16 and the employer is allowed to impose discipline for tardiness. Mr. Pierson chose not to allow the claimant to work until 8:00 a.m. The employer was within his rights to change hours of the claimant as a discipline for his tardiness. The claimant was simply using his argument that the employer was cutting his hours in attempt to justify his ongoing argument with Mr. Pierson. The Administrative Law Judge is not persuaded that the claimant was concerned about his hours as he chose to leave early on April 15 despite the fact that he could have stayed longer and worked his regular scheduled hours. The claimant chose not to work all the hours he was scheduled. He was simply arguing with Mr. Pierson about his hours despite the fact that he was admittedly tardy. The Administrative Law Judge is similarly not persuaded that Mr. Pierson sent the claimant home when he was not going to be allowed to punch in when arriving late. Mr. Pierson was willing to allow the claimant to work from 8:00 a.m. to 4:00 p.m. until the claimant began arguing with him about 'cutting' his hours. The Administrative Law Judge is persuaded that the claimant was arguing with Mr. Pierson on April 16 due to his own tardiness and raised the 'cutting hours' just to further the argument. The totality of the claimant's actions; including his arguing with Mr. Pierson about his discipline for tardiness on April 16, his tardiness and his ongoing failure to follow instructions

from Mr. Nelson amount to sufficient misconduct to disqualify him from receipt of unemployment insurance benefits.

DECISION:

The May 14, 2012 (reference 01) decision is affirmed. The claimant was discharged from employment due to 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.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs