

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ERWIN A CASTRO
Claimant

HORMEL FOODS CORPORATION
Employer

APPEAL 18A-UI-00296-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/17/17
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 3, 2018, (reference 01) unemployment insurance decision that denied benefits based on his discharge for falsifying his application for hire. The parties were properly notified of the hearing. A telephone hearing was held on February 22, 2018. The claimant participated and was represented by attorney Jeff Duff. The employer participated through Hearing Representative Beverly Maez and witness Erin Montgomery. Employer's Exhibits 1 and 2 were received into evidence.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time on the third shift slice line rotation from February 2, 2017, until this employment ended on December 15, 2017, when he was discharged.

In early December 2017 claimant filed a worker's compensation claim after injuring his shoulder while at work. As part of that process claimant signed a release for his medical records. On December 15, 2017, it was brought to the employer's attention that claimant had previously suffered a shoulder injury, which he did not disclose to the employer upon his hire. On January 30, 2017, claimant was required to fill out a post-offer, pre-employment Physical Assessment Questionnaire. (Exhibit 1). Among other things the questionnaire asked the following:

Have you had or do you have [shoulder problems]?
Have you had surgery of the [shoulder]?
In the past, have you had pain, aching, numbness or tingling in [the shoulder]?
Have you ever had an injury in the [shoulder] area?
Have you had a problem in the [shoulder] area associated with work?

The answers on the questionnaire are “N,” indicating “no,” to all of these questions. There are at least two other questions in areas involving general health and ergonomics that have a “Y,” or “yes,” answer. At the bottom of the questionnaire is a directive in all caps stating: “PLEASE READ BEFORE SIGNING” and a certification stating: “My answers to this questionnaire are true to the best of my knowledge. I agree that any discrepancies or misrepresentation of facts is grounds for termination of my employment...” Below that warning is claimant’s signature and a date of 01/30/17.

Montgomery testified that, in filling out these questionnaires, it is important for employees to be honest, so that they are not placed in a job that could lead to injury. Montgomery testified claimant’s medical documentation showed he not only suffered a previous shoulder injury, but that the injury had required surgery, and claimant was issued a permanent 20 pound lifting restriction. (Exhibit 2). None of the information was disclosed on the questionnaire. According to Montgomery, had the questions been answered appropriately, work was available that could have accommodated the prior injury. When it was discovered claimant had not been honest on the questionnaire, the decision was made to terminate his employment.

Claimant testified he was not deliberately dishonest with the employer. According to claimant a nurse with the employer assisted him with filling out the questionnaire. Claimant testified he told the nurse about his prior shoulder injury and that she said, as long as he was not having any problems now, it was fine. Claimant further testified that he did not read any of the document, including the questions, answers, and warning at the bottom, prior to signing, as he trusted the nurse. Finally, claimant testified he had forgotten about his lifting restriction, as it was placed on him on 2004.

Claimant further argued that the reasons given to him for his termination were pretext and that the real reason he was discharged was for filing a worker’s compensation claim and for complaining about race-based harassment and discrimination the month prior. The employer testified neither of the individuals whom the claimant had reported for race-based harassment and discrimination were part of the decision making process to terminate him. Montgomery further testified that claimant’s complaints had been investigated and were being addressed. Other than the timing of his discharge, claimant offered no other evidence supporting his claim.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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 decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer has satisfied its burden to establish the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Honesty is a reasonable, commonly accepted duty owed to the employer. Further, the employer owes a duty to its employees to ensure they are safe while at work and to prevent injury when possible. The employer relied upon the claimant's truthfulness in completing his Physical Assessment Questionnaire and when determining placement at the time of his hire. The employer cannot competently make placement decisions if the employees' answers on these questionnaires are not accurate, putting employees and the employer at risk. The questionnaire clearly states individuals may be terminated for misrepresenting information in the questionnaire. Claimant was asked five separate questions about his shoulder that he answered "no" when "yes" would have been the accurate answer. Additionally, he failed to disclose a permanent 20 pound lifting restriction. This put claimant at risk for injury. The administrative law judge is persuaded the claimant knew or should have known his conduct was contrary to the best interests of the employer. While the claimant has argued his termination was actually retaliation for complaining about civil rights violations and for filing a worker's compensation claim, he has not provided sufficient and convincing evidence to support this allegation. Therefore, based on the evidence presented, the administrative law judge concludes the claimant was discharged for misconduct, even without prior warning. Benefits are denied.

DECISION:

The January 3, 2018, (reference 01) unemployment insurance 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.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs