

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ADRIAN M BRENNAN
Claimant

CHRISTENSEN FARMS & FEEDLOTS INC
Employer

APPEAL 17A-UI-13263-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/19/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 18, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 18, 2018. The claimant participated personally. The employer participated through Lucinda Noronha, employee relations specialist. 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.

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: The claimant was employed full-time as a construction site supervisor beginning in April 2015 and was separated from employment on November 16, 2017, when he was discharged for violating employer's biosecurity protocol.

The employer operates a farm and feedlot, which requires special precautions to be taken when employees and vendors enter and exit the premises, to ensure safety of the animals on site. The claimant acknowledged he was familiar with the employer protocol and the importance of biosecurity measures.

As a construction site supervisor, the claimant would coordinate vendors to perform maintenance at the employer's locations. As part of the employer's protocol, the claimant was expected to notify his manager, the farm manager and the barn manager before vendors arrived. The evidence is disputed as to whether the claimant was permitted to simply call his contacts or conduct an actual pre-construction meeting. He then was also responsible for ensuring the vendors complied with biosecurity measures which required showering in/out, wearing only employer issued shoes/clothing, before entering the barns.

On November 14, 2017, the claimant was scheduled to have a roof and barn door fixed. This maintenance was originally scheduled for a month prior but delayed. The claimant stated at the hearing, he notified Brandon Gifford, manager, of the updated plans in advance. The employer asserted the claimant told his manager, Korey Kleper that did not update his contacts, but rather forgot to make contacts and notified Mr. Gifford on the day of, around 11:00 a.m. (See fact-finding documents). The claimant left the construction crew unattended at approximately 2:00 p.m. to drive home. He believed they would be working only on the roof that day and would not work on the door. If the crew only worked on the roof, they would not be required to change clothing and shower. However, the claimant also acknowledged there were some communication issues due to a language barrier.

After the claimant left the site, the employer discovered someone had tracked in mud or boot tracks through the office, which is accessed en route to the barn. The claimant did not believe it was the crew but was not there to verify. He also stated he thought the crew would only be working on the roof and not the faulty barn door that day. The employer verified only the claimant, crew and custodial staff were there on site at the time the tracks occurred. The employer determined that someone had entered and exited the barn without the proper footwear and showering, while under the claimant's supervision that day. As a result, the employer had to halt operations and test 500 animals to make sure they had not been affected by the breach in biosecurity.

Prior to discharge, the claimant had been twice counseled for this lack of communication in April 2017, and September 2017. The employer stated the final incident was egregious enough to warrant immediate discharge, regardless of prior discipline. He was subsequently discharged.

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, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). 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.*

Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995).

Assessing the credibility of the witnesses 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 to be more credible than the claimant. This case turns on the claimant's lack of communication with the employer about a construction crew on November 14, 2017, and his lack of communication with the crew about biosecurity measures to be followed. While the employer concluded the final incident was so egregious to warrant immediate discharge, regardless of past discipline, the administrative law judge finds the two prior warnings in April 2017 and September 2017 for a lack of communication to be relevant in determining credibility, inasmuch as it demonstrated a history of previously not communicating properly with the employer. Based on the evidence presented,

the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Workers in the human food production and processing industry reasonably have a higher standard of care required in the performance of their job duties to ensure public safety and health, as well as safety onsite. The claimant was aware of the employer's biosecurity protocols which required he communicate with multiple members of management before bringing a construction crew onsite, and then he was responsible for supervising the crew, ensuring they complied with employer rules, which included showering in/out, changing clothes and boots, etc. The administrative law judge is not persuaded the claimant properly updated his barn manager, supervisor and farm manager, of the rescheduled crew on November 14, 2017. The claimant acknowledged to his manager, Mr. Kleper, that he forgot (See fact-finding documents).

However, even if he did, by calling Mr. Gifford on the day of the scheduled maintenance, the claimant still did not properly supervise the crew to ensure they understood and complied with the employer's biosecurity rules. The claimant acknowledged there was a language barrier between the parties, and he thought they would stay on the roof and not enter the barn. However, if they entered the barn, they would be required to shower in/out and change. The claimant then left the crew unattended, allowing someone from the crew to track dirt/mud through the office, which was indicative of entering the barn.

In light of the language barrier, the administrative law judge is persuaded the claimant should have stayed with the crew to make sure they did not enter the barn without following protocol. Based on the evidence presented, the claimant failed to properly and effectively communicate with both management about the crew's arrival, and the crew itself, inasmuch as the crew did not follow protocol before entering the barn. As a result of the claimant's failure to properly communicate, the employer had to halt operations and test 500 animals. In light of the potential harm to the employer for violating biosecurity measures, the administrative law judge is persuaded the claimant knew or should have known his conduct was contrary to the best interests of the employer. Therefore, based on the evidence presented, the claimant was discharged for misconduct. Benefits are denied.

DECISION:

The December 18, 2017, (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.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn