

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JERRY L HUNTER
Claimant

CASCADE LUMBER COMPANY
Employer

APPEAL 16A-UI-06567-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/15/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 3, 2016 (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on June 27, 2016. The claimant participated personally. Jack Turner, current employee, also testified. The employer participated through Eric Bauer, plant manager. 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 second shift supervisor and was separated from employment on May 17, 2016, when he was discharged for conduct unbecoming of a supervisor. At the time of hire, the claimant was issued access to a company handbook, including the employer's policy which places employees on notice that they may be disciplined for off-duty conduct if it adversely affects the employer.

The claimant had recently been promoted to second shift supervisor, effective April 11, 2016, and had been training. One of the claimant's subordinates was also a friend of his and had been for years. The claimant knew his children and family, and also knew that he engaged in use or selling of marijuana. In light of the knowledge, the claimant never reported the friend to the employer until after May 13, 2016; after the final incident occurred.

On May 6, 2016, in his personal time, the claimant called this co-worker and left him a message, while intoxicated, stating he needed to talk to the co-worker about "weed." The co-worker was frustrated with the claimant, who was trying to cross-train employees, and reportedly told other employees, including Jack Turner, about the voicemail, which he saved, so he could use it

against the claimant at some point. When the claimant became aware of the co-worker's plans, he decided to confront the co-worker, again off premises, by making a visit to the co-worker's house on May 13, 2016. During the exchange, the claimant asked to step in the garage with the co-worker so his children would not hear the conversation, in which the claimant told the co-worker that if he tried to mess with the claimant's livelihood or blackmail him with the voicemail, a bad review would be the least of his problems and that he would be more likely to call law enforcement on him about his marijuana related activities. An argument ensued. The co-worker reported the conversation to management and the claimant at that time reported the purported drug use/sales of the co-worker. The claimant was subsequently discharged for conduct unbecoming of a supervisor, based on the two incidents, and without prior warning.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant was discharged for work-connect misconduct and benefits are denied.

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.

The law defines misconduct as:

1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a). Misconduct "must be substantial" to justify the denial of unemployment benefits. *Lee*, 616 N.W.2d at 665 (citation omitted).

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work-connected." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). The court has concluded that some off-duty conduct can have the requisite element of work connection. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, for an employer to show that the employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence that the employee's conduct (1) had some nexus with the work; (2) resulted in some harm to the employer's interest, and (3) was conduct which was (a) violation of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest

would suffer. See also, *Dray v. Director*, 930 S.W.2d 390 (Ark. Ct. App. 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), quoting *Nelson v. Dept of Emp't Security*, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§ 77–78.

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 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 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.

In this case, the claimant was in a management role, effective April 11, 2016, and as such, was held to a higher standard than his subordinates. Over a period of a week, the claimant first left a drunken voicemail for a subordinate co-worker referencing marijuana. Then the claimant elected to confront the co-worker, not in the workplace, but at his private residence when he heard the co-worker may attempt to use voicemail against the claimant, threatening to call law enforcement on him or give him a poor job review. Had the claimant simply left a voicemail one evening for a friend turned subordinate, it could be argued that his behavior was the product of an isolated instance of poor judgment. Inasmuch though that the claimant then confronted the subordinate employee, at home on May 13, 2016, and threatened him, does not support the claimant engaged in a lapse in judgment or miscommunication. Rather, the claimant purposefully initiated the confrontation with the employee.

The administrative law judge is persuaded that the claimant's conduct, although off duty, did have some nexus with the work inasmuch as he referenced his position in management as having authority over the employee to give a poor review, and resulted in harm to the employer, given that the claimant was in a role of authority as manager. The administrative law judge does not condone the subordinate co-worker's threats to use the claimant's voicemail as leverage or blackmail against him, but it cannot be ignored that it was the claimant's own conduct which triggered the voicemail being left. Further, the administrative law judge found the claimant's feigned concern to report the co-worker's drug use/sale to the employer to be disingenuous, giving the timing of his voicemail and confrontation with the co-worker. Based on the evidence presented, the claimant knew or should have known his actions of calling a subordinate while intoxicated (and referencing marijuana), followed by threatening the co-worker in his home, with respect to calling law enforcement or giving a poor review, was in disregard of the employer's interests and reasonable standards of behavior that the employer has a right to expect of its employees. Misconduct has been established. Benefits are denied.

DECISION:

The June 3, 2016 (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.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

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