

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LOVONA K CLARK
Claimant

DAVENPORT FARM & FLEET INC
Employer

APPEAL 16R-UI-04657-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/07/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 29, 2016 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for conduct not in the best interest of her employer. The parties were properly notified of the hearing. A telephone hearing was held on May 9, 2016. The claimant, Lovona K. Clark, participated. The employer, Davenport Farm & Fleet, Inc., participated through Marilyn Lovejoy, Associate Relations Manager; and David Nitschke, Assistant Store Manager. Employer's Exhibits A and B were received and admitted into the record without objection.

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 as a service desk employee from October 9, 2002 until this employment ended on January 27, 2016, when she was discharged for being rude to a manager, a coworker, and a customer.

Claimant was involved in assisting a customer on January 26, 2016, along with Nitschke, Val (assistant manager), and Darian (coworker). When Nitschke was contacted via telephone to assist claimant and Darian, he heard claimant say "I told you I was right." Several minutes later, Nitschke was paged downstairs to help claimant and Darian. Claimant was leaning on the counter away from the customer and said to Nitschke "I don't know what you want to do with him," referring to the customer. When the customer mentioned he believed his tool was covered by a three-year warranty, claimant replied that it was only a 90-day warranty. Nitschke looked up the product in the computer and determined it was covered by a five-year warranty. Nitschke described claimant's behavior as snotty, short, and rude. Darian told Nitschke he felt claimant was rude and he personally left the interaction feeling undermined and disrespected.

Claimant had been warned several times in the year prior to her discharge for similar conduct. Claimant received a Last and Final Warning on October 9, 2015, because a customer complained that she was rude, had an attitude, appeared cranky, and was uncooperative in

processing a refund. At this time, claimant was informed that her job was in jeopardy. Claimant received a Level 3 Written Warning on July 28, 2015, involving a customer complaining that claimant was rude to her and hung up on her. Claimant received a Level 2 Coaching on June 5, 2015, because a customer complained that she was rude and not willing to help him or her related to a jeans return.

REASONING AND CONCLUSIONS OF LAW:

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

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, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's witnesses provided more credible testimony than claimant. Claimant contradicted herself during her testimony, and it is difficult to believe that claimant does not think she was ever rude, even though multiple customers and coworkers complained about her behavior. In contrast, the employer's witnesses provided details of claimant's behavior and Nitschke credibly recalled claimant's conduct toward him, her coworker, and the customer on January 26, 2016.

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).

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). 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).

Claimant's repeated failure to improve her attitude at work after having been warned is evidence of negligence or carelessness to such a degree of recurrence as to rise to the level of disqualifying job-related misconduct. See Iowa Admin. Code r. 871-24.32(1)a. Even if claimant did not believe her conduct was objectionable, her June 5, 2015, job coaching put her on notice that at least one customer found her rude, and it notified her that the employer took these issues seriously. Therefore, claimant was on notice at that point that she needed to improve her attitude. Claimant admits she continued to receive customer complaints and have issues with rudeness in the workplace. The employer has established that claimant was discharged for disqualifying job-related misconduct. Benefits are withheld.

DECISION:

The February 29, 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 she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Elizabeth Johnson
Administrative Law Judge

Decision Dated and Mailed

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