

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SARAH L CARTER
Claimant

O'REILLY AUTOMOTIVE INC
Employer

APPEAL 18A-UI-10739-AW-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/07/18
Claimant: Appellant (1)**

Iowa Code § 96.5(2) – Discharge for Misconduct
Iowa Admin r. 871-24.32 – Discharge For Misconduct

STATEMENT OF THE CASE:

Sarah Carter, Claimant, filed an appeal from the October 23, 2018 (reference 01) unemployment insurance decision that denied benefits because she was discharged from work with O'Reilly Automotive, Inc., due to causing dissension. The parties were properly notified of the hearing. A telephone hearing was held on November 14, 2018 at 1:00 p.m. Claimant participated. Employer participated through Ben Deboer, District Manager, and Jessica Jones, Store Manager. Employer's Exhibit 1 was admitted.

ISSUE:

Whether claimant's separation was a discharge due to 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 Hub Delivery Specialist from November 4, 2015 until her employment with O'Reilly Automotive, Inc. ended on October 4, 2018. (Deboer Testimony; Claimant Testimony) Claimant's job duties included operating a company vehicle to deliver parts to stores along a set route. (Deboer Testimony)

Employer has a policy stating that cell phones are not permitted in the passenger compartment of delivery vehicles. (Exhibit 1) Employer also has a policy against the unauthorized photographing of fellow team members on company property. (Exhibit 1) These policies are included in the employee handbook. (Deboer Testimony) Claimant received a copy of the employee handbook. (Exhibit 1; Deboer Testimony)

On August 22, 2018, claimant used her cell phone to send a co-worker ("Jones"), a message while claimant was operating a company vehicle. (Jones Testimony) Jones brought the incident to the employer's attention on September 12, 2018. (Jones Testimony) On September 14, 2018, claimant was given a written final warning for using her cell phone while operating a company vehicle. (Exhibit 1; Deboer Testimony) The warning states that claimant may be terminated if she fails to follow company policy or engages in retaliation. (Exhibit 1; Deboer

Testimony) When the warning was issued, employer told claimant that Jones was the co-worker who reported the cell phone policy violation. (Deboer Testimony) Approximately a half hour after claimant was issued the warning, claimant called Jones to express her displeasure that Jones had reported her. (Deboer Testimony)

On September 27, 2018, claimant observed Jones leaning against a stool while counting inventory; claimant believed using a stool was against company policy. (Claimant Testimony) Claimant retrieved her cell phone from the company vehicle, took a photograph of Jones and forwarded the photograph of Jones to the district manager with a message “this is not allowed.” (Deboer Testimony; Claimant Testimony) Jones did not authorize claimant to take her photograph. (Jones Testimony; Exhibit 1) Claimant took Jones’s photograph and forwarded it to the district manager in an effort to get Jones in trouble in retaliation for Jones reporting claimant’s cell phone usage while operating a company vehicle. (Jones Testimony; Deboer Testimony)

On October 4, 2018, claimant was discharged from employment for violation of company policy; claimant’s discharge was pursuant to employer’s progressive discipline process. (Deboer Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for disqualifying, job-related misconduct. Benefits are denied.

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 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:

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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp’t Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp’t Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Further, 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). A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Claimant's actions on September 27, 2018 violated two of employer's policies. By taking Jones's photograph, claimant violated the company policy prohibiting the unauthorized photographing of a fellow team member on company property. By forwarding Jones' photograph to the district manager, claimant violated the company policy prohibiting retaliation. Retaliation was the only reason for claimant to forward the photograph of Jones to the district manager with the message "this is not allowed" just two weeks after claimant was disciplined for violating the company policy reported by Jones.

Claimant's actions on September 27, 2018 were a final act of misconduct and a deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees. Claimant had been warned that further violations of company policy or acts of retaliation may result in her termination. Claimant should have known that her job was in jeopardy. Claimant was discharged for disqualifying, job-related misconduct. Benefits are denied.

DECISION:

The October 23, 2018 (reference 01) unemployment insurance decision is affirmed. Benefits are denied until such time as the claimant works in and has been paid wages for insured work equal to ten times claimant's weekly benefit amount.

Adrienne C. Williamson
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Decision Dated and Mailed

acw/scn