

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOSEPH E MCGIVERN
Claimant

BRAD DEERY MOTORS
Employer

APPEAL 21A-UI-04195-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/01/20
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

On January 29, 2021, Joseph E. McGivern (claimant) filed an appeal from the January 19, 2021, reference 01, unemployment insurance decision that denied benefits based upon the determination Brad Deery Motors (employer) discharged him for sleeping on the job. The parties were properly notified about the hearing held by telephone on April 6, 2021. The claimant participated personally. The employer was represented by Thomas Kuiper and participated through Joel Kilburg, Office Manager, and Dan Omara, General Manager. The employer's exhibits 1 through 3 were admitted into the record.

ISSUE:

Did the employer discharge the claimant for 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 Sales Consultant beginning on May 16, 2016, and was separated from employment on October 30, 2020, when he was discharged. The employer has policies forbidding employees to sleep on the job or falsify documents. They are zero tolerance policies, and a single violation will result in immediate discharge.

In January 2020, the claimant's desk was located at the front of the sales floor by the customer entrance. However, the claimant was observed playing Scrabble on his cell phone during work hours and he was moved to the back of the sales floor. The claimant contends he was taking the equivalent of a smoke break because he does not smoke and smokers can take regular breaks throughout the day.

The employer employs Amy, whose primary job function is to monitor that sales consultants are making their daily, required sales calls. The employer has a system that alerts when a call needs to be made and the employer has the employees place the call through the same system to allow them to be tracked. On or about October 28, Amy reported to the employer that the claimant was not making his required calls. He would mark the calls as completed when they

were not or he would change the phone number in the system so it would not call the customer but another business. The claimant had previously received a warning for this conduct in 2018.

On October 28, the claimant asked to go on break, and he was told he had to wait because there were already others on break. The claimant takes medications and some of them should be taken with food. The claimant took his medications and became groggy. Some of his co-workers reported to Dan Omara, General Manager, that the claimant was asleep at his desk. Omara woke the claimant and brought him back to the office. The claimant was discharged for violations of the employer's policies.

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. Benefits are denied.

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).

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). 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). 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).

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.* When 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.*

The findings of fact show how the disputed factual issues were resolved. After assessing the credibility of the witnesses who testified during the hearing, the reliability of the evidence submitted, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge attributes more weight to the employer's version of events. The claimant's testimony that he was not sleeping and that he made all of his work calls is not credible. After testifying that he was not asleep, the claimant admitted to being groggy. Additionally, after claiming to have made all of his work calls, he testified that customers do not like to be called every day; sometimes he made the calls from his cell phone, which the employer did not like; and, everyone would find ways around making the sales calls and talked about it openly.

The employer has met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. The employer can reasonably expect its employees to work while they are at work. The claimant's conduct indicates a deliberate disregard of the reasonable expectations the employer has for its employees. Accordingly, benefits are denied.

DECISION:

The January 19, 2021, 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.



Stephanie R. Callahan
Administrative Law Judge

April 14, 2021
Decision Dated and Mailed

src/kmj

Note to Claimant: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision, you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits, but who unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to self-certify for PUA to determine your eligibility under the program.** Additional information on how to self-certify for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>. If this decision becomes final or if you are not eligible for PUA, you may have an overpayment of benefits.