IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

CARLOS H TREVINO
Claimant

THE ANDERSONS INC
Employer

APPEAL NO. 16A-UI-08472-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/03/16
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

The Andersons (employer) appealed a representative's July 26, 2016, decision (reference 01) that concluded Carlos Trevino (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 23, 2016. The claimant participated personally. The employer was represented by Steven Zaks, Hearing Representative, and participated by Michael Shrum, Plant Manager. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on May 1, 2012, as a full-time operations worker three. The claimant signed for receipt of the employer's site safety rules on February 13, 2015, May 6, 2014, and October 29, 2015. The employer has a Mobile Phone Policy but the claimant did not see it. The employer had a policy that stated either, "Cell phones can be allowed in personal vehicles or company vehicles or break rooms if considerations are made by local management" or "Cellphones must be kept in vehicles unless special permission is granted by management to allow an employee to have it in the break rooms". The claimant saw 90 percent of his co-workers using their phones for personal use during work hours. Workers carried their phones with them. The employer often asked the claimant to use his phone for company business. He understood he should not use his cellphone in a class one division one area.

On June 23, 2014, the employer issued the claimant a written warning for a safety violation when he entered a semitrailer to get a better view while a co-worker was loading it. On December 30, 2014, the employer issued the claimant a verbal warning for using his cellphone

while working near a class one division one area. On April 17, 2015, the employer issued the claimant a written warning for failure to wear safety eyewear on two occasions. On October 20, 2015, the employer issued the claimant a written warning and three-day suspension for a safety violation.

One July 7, 2016, the claimant had been operating a payloader. While the machine was stopped and not operating, the employer saw the claimant look at his lap. The employer asked the claimant to come away from the machine and talk. The employer asked the claimant to show them his phone. The claimant took it out of his pocket and demonstrated to the employer that it was dead. It had not been charged. The employer sent the claimant home. On July 8, 2016, the employer terminated the claimant.

The claimant filed for unemployment insurance benefits with an effective date of July 3, 2016. The employer did not participate in the fact-finding interview on July 22, 2016. The employer provided the name of Julie Hages as the person who would participate in the fact-finding interview. The fact finder called Julie Hages but she was not available. The fact finder left a voice message with the fact finder's name, number, and the employer's appeal rights. The employer did not respond to the message.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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 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).

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 employer discharged the claimant and has the burden of proof to show misconduct. Prior to July 7, 2016, the claimant carried his cellphone at work like most of his co-workers. He helped out the employer by making calls. The claimant knew he should not take his phone into certain areas. Suddenly on July 7, 2016, the employer terminated the claimant for having an inactive cellphone on his person during work hours in an authorized area. The claimant's behavior on July 7, 2016, does not rise to the level of misconduct because he was following the rules the employer had. Consequently the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's July 26, 2016, decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs