

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KELVIN V MORATAYA
Claimant

LABOR GUYS LLC
Employer

APPEAL 18A-UI-03724-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 02/25/18
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the March 16, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on April 17, 2018. The claimant participated personally. The employer participated through Juan Miranda, human resources specialist. Employer Exhibit 1 was admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. 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.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

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 maintenance mechanic and was separated from employment on March 2, 2018, when he was discharged for insubordination.

The employer operates a staffing firm but has only one client in the state of Iowa. When the claimant was separated from the assignment, he was not eligible for other assignments. At the time of hire, the claimant was provided the employer and client rules, which state that insubordination is grounds for disciplinary action (Employer Exhibit 1). The undisputed evidence is the claimant had two prior written warnings related to attendance in October and December 2017 (Employer Exhibit 1). He had no prior warnings related to refusal to follow instructions, production or job performance.

Because the claimant was considered to have a low production rate, he was selected with his co-worker to help cover the job position of shipper for a one-week period so another employee

could go on vacation. The claimant had previously covered positions for employees while on vacation but remained at the same rate of pay. This time however, the claimant was informed that he was expected to perform work for two and a half days (20 hours) at \$16.00 per hour instead of his usual \$22.00 per hour. The claimant would have earned \$120.00 less over the two-day period for covering the position than if he performed his usual job duties. The claimant informed his supervisor Lisa that he would have no issue covering the position but would not work it at a reduced rate of pay. She informed him if he did not work the shipping position at the reduced rate of pay that he would be shown the door to leave. He was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,795.00, since filing a claim with an effective date of February 25, 2018. The administrative record also establishes that the employer did participate in the March 15, 2018 fact-finding interview or make a witness with direct knowledge available for rebuttal. Juan Miranda participated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

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 not 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.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). In this case, the claimant was discharged from the assignment and employment when he refused to perform work as a shipper for two and a half days while a co-worker was on vacation. The claimant was hired and performed work as a maintenance mechanic, earning \$22.00 per hour, and had historically accepted covering other positions within the company when needed, because he was able to remain at the same rate of pay during the period of coverage. For unknown reasons however, the employer insisted the claimant as a low-producer, accept the coverage and would have to accept a \$6.00 per hour demotion for a period of 20 hours. This would have resulted in the claimant earning \$120.00 less for two and a half days of work because of no fault of his own. The undisputed evidence presented is that the claimant had never been warned for his production or that low production would require he accept job coverage assignments, and no evidence was presented that there was any rule or policy that put the claimant on notice that he must cover other positions at a lower rate of pay when asked. For these reasons, the administrative law judge is not persuaded the employer's request was reasonable under the circumstances to expect the claimant to accept a \$120.00 reduction in pay for one week without warning and by no fault of his own, simply because a co-worker in another department was taking vacation. Accordingly, the administrative law judge concludes the claimant's refusal to take a \$120.00 demotion for the week was a good cause reason for non-compliance with the employer's request, and that the request itself, was not reasonable under the circumstances.

Even if the claimant's refusal to perform work at a \$6.00 per hour pay cut was deemed to be a reasonable request, and the claimant's refusal to perform duties as a shipper insubordinate, the administrative law judge concludes the conduct for which the claimant was discharged was an isolated incident of poor judgment and inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. Training or general notice to staff about a policy is not considered a disciplinary warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to job related misconduct. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

DECISION:

The March 16, 2018, (reference 01) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld shall be paid, provided he is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not relieved of charges associated with the claim.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn