

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LORENZO B JOHNSON
Claimant

PARCO LTD
Employer

APPEAL 16A-UI-08208-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/26/16
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 20, 2016, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for conduct not in the best interest of the employer. The parties were properly notified of the hearing. A telephone hearing was held on August 15, 2016. The claimant Lorenzo Johnson participated and testified. The employer ParCo LTD participated through Director of Human Resources Jessica Walsh.

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 part time as a crew member from January 14, 2016, until this employment ended on June 28, 2016, when he was discharged.

According to the employer, on June 27, 2016, claimant was asked by a manager, Andrew, to wash some dishes. Walsh testified there was a verbal disagreement between claimant and Andrew when claimant refused to do what he was asked and instead sat in the back on his phone. Claimant was written up by Andrew for this incident. Walsh testified that, prior to writing claimant up, Andrew had multiple conversations with claimant regarding his duties and responsibilities. The write-up noted claimant violated the misconduct and performance management policy. This was claimant's third write-up for violating this policy since March 21, 2016. The policy generally provides that employees are to complete any tasks as assigned by a manager unless otherwise discussed. The policy is located in the handbook, which Welsh testified claimant signed an acknowledgement of receipt for at his time of hire. Claimant denied he ever received a copy of the handbook, but testified he might have signed something stating he read it.

Claimant's prior two write-ups occurred on May 22 and March 21, 2016. The May 22 write-up stated that claimant left work at 3:30 p.m. when he was scheduled to work until 5:00 p.m., despite being specifically advised by Andrew that he could not leave early. Walsh testified the May 22 write-up specifically advised claimant that further violations would lead to termination. Claimant could not recall the warning stating anything about termination. The March 21 write-up was for an incident where claimant was alleged to have left his station without permission twice during the rush period to go outside and smoke.

Claimant testified that all three write-ups were fabricated by Andrew due to personal issues between the two. According to claimant one of these issues involved a rumor that he had gotten another manager, who Andrew was friends with, fired several months before. Claimant testified he never reported Andrew's write-ups as fabrications because he feared Andrew would retaliate against him and because he did not have the phone numbers for anyone at the district manager or corporate level. Walsh testified there is a poster in the workplace that is accessible to all employees with phone numbers for herself, the district manager, and another member of corporate management.

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.

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 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.

871 IAC 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 Department of Job Service, 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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). 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). 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).

The decision in this case rests, at least in part, on the credibility of the witnesses. 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, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented substantial and credible evidence that claimant continued to ignore directives given to him by his supervisor after having been warned. Claimant received at least two prior written warnings regarding this issue within the three month period prior to his separation and on the day of the final incident was reminded multiple times what the expectations of his position were. Claimant was specifically advised, on May 22, that further violations would lead to termination. Despite these warnings, claimant continued to engage in similar behavior. This is disqualifying misconduct.

DECISION:

The July 20, 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 he is otherwise eligible.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

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