

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DEWAND K YOUNG**  
Claimant

**APPEAL NO. 17A-UI-02320-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**T M INC**  
Employer

**OC: 02/05/17**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Dewand Young (claimant) appealed a representative's February 27, 2017, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with T. M. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for March 24, 2017. The claimant participated personally. The employer participated by Cary Reisch, Human Relationship Manager.

**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 March 21, 2011 as a full-time vendor direct coordinator. The claimant signed for receipt of the employer's handbook on September 17, 2013. The handbook prohibits the use of cellphones at work. The claimant's supervisor allowed employees to use cellphones during work for music and podcasts. Employees could use their cellphones for other things during break time.

On August 22, 2016, the employer issued the claimant a written warning for not meeting the employer's performance expectations and using his cellphone at work to look at Facebook. The employer notified the claimant that further infractions could result in termination from employment. From that day forward the claimant only used his cellphone for music and podcasts while working.

The claimant performed work for four different factories at the Waterloo, Iowa, location. As he performed the work the machinery would record the claimant's error rate. The supervisor told the claimant he was within the normal error rate except for one of the factories. The claimant understood the supervisor to say the equipment at one factory was incorrectly recording errors for the week ending January 23, 2017. The employer terminated the claimant on February 3, 2017, for unknown errors and cellphone usage.

## 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 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).

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.

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 must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The employer was not able to provide sufficient evidence of a final incident of misconduct. It said there were errors which occurred during a week but could not provide any

more information about the errors except that they were made. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The claimant was the only first-hand witness to the statements of the supervisor about the use of cellphones at work. The employer had the power to present testimony but chose not to provide it. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

**DECISION:**

The representative's February 27, 2017, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs