

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

---

**CANDACE L COMSTOCK**  
Claimant

**APPEAL 17A-UI-00033-NM-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**PARTNERS ADVANTAGE INSURANCE  
SERV**  
Employer

**OC: 11/27/16  
Claimant: Appellant (1)**

---

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the December 22, 2016, (reference 01) unemployment insurance decision that denied benefits based upon her discharge for failure to perform satisfactory work. The parties were properly notified of the hearing. A telephone hearing was held on January 23, 2017. The claimant Candace Comstock participated and testified. The employer Partners Advantage Insurance Serv. participated through Hearing Representative Thomas Kuiper and Director of Operations Keith Kerr. Also present on behalf of the employer was Controller Lisa Leach. Employer's Exhibit 1 was received into evidence.

**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 full time as a commission specialist 2 from January 5, 2014, until this employment ended on November 28, 2016, when she was discharged.

In August 2016, the employer began noticing discrepancies with claimant's work production. Specifically, it noticed claimant's production number were much lower than other employees in her position and her error rates were much higher. The employer met with claimant to discuss this issue and she told them she was having difficulty concentrating on her work, which led to the issues with her performance. Claimant spoke to her doctor about the problems she was having and supplied the employer with documentation of a medical condition that led to her difficulty concentrating. In order to accommodate claimant, the employer reduced her work production numbers.

Despite this accommodation the employer continued to notice days where claimant was below the adjusted work production standards. When reviewing claimant's numbers for November Kerr noticed two dates that were of particular concern. On November 11 claimant only averaged one line of work per hour and on November 15 she averaged two lines of work per hour. Claimant had been averaging between ten and 12 lines of work per hour. Kerr confronted

claimant about these discrepancies. Claimant initially attributed the drop in production to research she was doing. Kerr testified this explanation did not make sense to him, as any research should not take up that much of claimant's day, so he asked her if she had actually been working the full eight hours she reported those days. According to Kerr claimant then admitted she had not worked those days. Claimant was later terminated for misuse of company time.

During the hearing claimant testified she was having problems concentrating those days and would drift off from her work. Claimant further admitted there was at least some time on those two dates that she reported she was working when she was not. Claimant also testified she was doing other work during some of the time on these dates, but the work could not be accounted for because she did not enter it into the employer's system.

### **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:

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). 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).

The claimant has argued her production numbers were low because she was working on other tasks and had problems concentrating, though she also admitted she was not doing work for some of the time in question. 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, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's recollection of events more credible than that of the claimant.

Reporting to have worked time that was not actually worked is theft from the employer. Theft from an employer is generally disqualifying misconduct. *Ringland Johnson, Inc. v. Hunecke*, 585 N.W.2d 269, 272 (Iowa 1998). In *Ringland*, the Court found a single attempted theft to be misconduct as a matter of law. In this case, the claimant deliberately disregarded the employer's interest. The claimant engaged in disqualifying misconduct even without previous warning. Benefits are denied.

**DECISION:**

The December 22, 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 she is otherwise eligible.

---

Nicole Merrill  
Administrative Law Judge

---

Decision Dated and Mailed

nm/