

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KORY C. SCHUBERT
Claimant

HY-VEE INC.
Employer

APPEAL 21A-UI-09583-CS-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 02/14/21
Claimant: Appellant (1)**

Iowa Code §96.5(2)a-Discharge/Misconduct
Iowa Code §96.5(1)- Voluntary Quit

STATEMENT OF THE CASE:

On April 5, 2021, the claimant/appellant filed an appeal from the March 25, 2021, (reference 01) unemployment insurance decision that disallowed benefits based on claimant being discharged for leaving work without employer permission. The parties were properly notified about the hearing. A telephone hearing was held on June 11, 2021. Claimant personally participated. Employer participated through representative Barbara Buss. Employer called District Human Resource Manager Carly Pedelty as a witness. Exhibit 1 was admitted into the record.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct? Is the claimant able to and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on August 15, 2017. Claimant last worked as a full-time meat clerk. Claimant was separated from employment on January 6, 2021, when he was discharged. On December 28, 2020, claimant was scheduled to work 10:00 a.m. until 6:00 p.m. Claimant went on his scheduled half hour break at 11:22 a.m. and then clocked back in at 11:55 a.m. Claimant decided he would leave work early. He did not get permission before leaving. Claimant left work at 2:08 p.m. when he left he did not clock out for the evening. The claimant returned to the employer and clocked out at 5:05 p.m. The employer has a policy that failing to clock out is time theft. Claimant was aware of the policy and acknowledged receipt on August 15, 2017. (Exhibit 1). Employer discharged claimant on January 6, 2021 for time theft due to their zero tolerance policy.

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 argued that the failure to clock out was not intentional. Claimant testified that due to the weather he was leaving early and was going to clock out but was distracted by helping a customer. Once he helped the customer he left. Claimant testified he realized his mistake when he got home but he had to return to the Employer at 5:00 p.m. because he had to drive his wife to her shift at the same employer. Claimant testified that he had previously had this issue before but told his supervisor and the supervisor would fix his timecard. Claimant worked with his supervisor the next day but failed to report the issue to his supervisor due to being busy at work. Claimant was going to tell his supervisor on December 30, 2020, but his supervisor was gone. Claimant was on vacation on beginning on December 31, 2020. When claimant returned he was notified by the store manager that he had been terminated by the store manager.

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 claimant's testimony was not credible. If claimant's actions in leaving and failing to clock out were unintentional he has ample opportunity to fix his mistake. Claimant made no attempt to rectify his failure to clock out. Claimant knew the zero tolerance policy the employer had regarding theft yet he did not notify another supervisor the day it happened or any day thereafter. Furthermore, claimant did not tell his supervisor the next day, leave a note, or call explaining his error. Theft of time 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. The claimant engaged in disqualifying misconduct even without previous warning. Benefits are denied.

DECISION:

The March 25, 2021, (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 has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.



Carly Smith
Administrative Law Judge
Unemployment Insurance Appeals Bureau

June 25, 2021
Decision Dated and Mailed

cs/scn

