

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**CECILIA LIZALDE VELASCO**  
Claimant

**SWIFT PORK COMPANY**  
Employer

**APPEAL 16A-UI-10085-NM-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/21/16**  
**Claimant: Appellant (2)**

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 September 12, 2016, (reference 01) unemployment insurance decision that denied benefits based upon her discharge for theft. The parties were properly notified of the hearing. A telephone hearing was held on September 30, 2016. The claimant Cecilia Lizalde Velasco participated and testified with the assistance of an interpreter from CTS Language Link. Brian Ulin was present as the claimant's non-attorney representative. The employer Swift Pork Company participated through Human Resource Supervisor Rogelio Bahena.

**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 general worker from January 9, 2014, until this employment ended on August 22, 2016, when she was discharged.

On August 22, 2016, claimant left work to attend a physical therapy session for a work-related injury. The paperwork submitted to the employer by claimant indicated she checked into the therapy facility at 3:07 p.m. and checked out at 4:13 p.m. During her physical therapy appointment claimant, who was pregnant, received a message from her obstetrician's office stating they needed to speak with her regarding test results and it was urgent. Claimant tried calling the office, but could not reach anyone. This is claimant's first pregnancy and she was very concerned something might be wrong with her baby. When claimant could not reach the doctor's office by telephone, she went to the office. Claimant's interpreter for her physical therapy appointment offered to go with her to interpret that appointment as well. Claimant did not return to work until 5:45 p.m. When she arrived back to work claimant gave the nurse her paperwork and reported that she had been at her obstetrician's office as well.

Because claimant was leaving work for treatment of a work-related injury, she was paid for her time away from work. Once the employer learned claimant was away for more than an hour to attend a personal appointment while on work time, the decision was made to terminate her employment for time theft. Claimant testified she was not aware she was being paid for her time away from work since she still was clocking in and out for her appointments. The employer agreed no one specifically told claimant she was being paid and that she still would have had to clock in and out for safety reasons. The employer further testified no one specifically told claimant she needed to return to work immediately after her physical therapy appointments, as they assumed she knew she was getting paid for her time. Prior to this claimant had been disciplined once for talking to a coworker away from her work area and once for returning to the line late after break. Claimant was unaware her employment was in jeopardy.

### **REASONING AND CONCLUSIONS OF LAW:**

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

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).

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. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The claimant has argued she did not knowingly violate the employer's policy as she was unaware that she was being paid for her time away from work or that her actions would have resulted in her being paid for time spent at a personal appointment. 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 credible.

Both parties agree claimant was still clocking in and out for her appointments and that no one specifically informed her she was being paid while she was gone. While it may have been poor judgment for claimant not to call the employer and let them know the situation right away, there is nothing to indicate she was being deliberately deceitful. Furthermore, it is unlikely that if claimant knew what she was doing was considered stealing time or otherwise violated the employer's policies, that she would report her actions to the employer immediately upon returning to work.

Claimant had never been warned about this type of conduct before. 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. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. The employer 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.

**DECISION:**

The September 12, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

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