

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

---

**MONTGOMERY D KNAPP**  
Claimant

**AGTAC SERVICES LLC**  
Employer

**APPEAL 18A-UI-02638-NM-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 01/07/18**  
**Claimant: Appellant (1)**

---

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the February 16, 2018, (reference 03) unemployment insurance decision that denied benefits based on his discharge. The parties were properly notified of the hearing. A telephone hearing was held on March 26, 2018. The claimant participated along with his non-attorney representative Joshua Steele. The employer participated through Security Director Brenda Shepard, Office Coordinator Wendy Wulf, and Shift Lead Trina McConnell. Employer's Exhibits 1 through 4 were 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 part time as a janitor from November 1, 2017, until this employment ended on January 10, 2018, when he was discharged.

On January 9, 2018, claimant was asked to fill out a self-evaluation in preparation for a performance evaluation. Claimant ranked himself as "unsatisfactory" in all areas except attendance, wrote down his goal for the next review was to have a different job, and under comments wrote, "Pay adequate amount for the amount of work." (Exhibit 3). Prior to receiving this evaluation claimant had received multiple coachings regarding his performance. Claimant received a written coaching on November 7, 2017, for misuse of company time. (Exhibit 1). The warning noted that claimant was spending too much time in his mother's office when he should be cleaning his designated areas. The warning states that a failure to improve might result in further disciplinary action including termination, though the threat of termination was never verbalized to the claimant.

On January 6, 2018, claimant was observed in his truck by McConnell as she was going in to clean her areas. When McConnell came out an hour later, claimant was still in his truck and his areas had not been cleaned. McConnell told claimant this was not acceptable. Claimant denied he was in his truck the entire time McConnell was cleaning and testified he was working on his areas, but they must not have been done to her satisfaction. On January 5, 2018, the employer was notified that the men's restroom in the client's maintenance area needed to be

cleaned. When McConnell followed up with a maintenance employee later in the day, he reported claimant never came to clean and the restroom was cleaned by one of the client's employees. When McConnell spoke to claimant about the situation, he insisted he did clean the restroom and that the maintenance employee must have missed seeing him and it must have gotten dirty again after he cleaned. Based on these incidents, along with claimant's response to his self-evaluation, the employer concluded claimant had no intent on or desire to improve his performance and separated him from employment.

### **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, 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 fail to perform his regular job duties after having been warned. Claimant received a written warning in November 2017 and numerous verbal warnings for McConnell about his work performance. While claimant may not have been verbally advised that his job was in jeopardy, the written warning from November 2017 clearly states termination is possible if improvement is not seen. Despite these warnings, claimant continued to engage in similar behavior. Claimant's response to his self-evaluation indicates he did not desire to try to improve his performance and shows a deliberate disregard for the interest of the employer. This is disqualifying misconduct. Benefits are withheld.

**DECISION:**

The February 16, 2018, (reference 03) 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.

---

Nicole Merrill  
Administrative Law Judge

---

Decision Dated and Mailed

nm/rvs