

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

GREGORY O KERNER
Claimant

**ALUMINUM CO OF AMERICA
DAVENPORT WORKS**
Employer

APPEAL 20A-UI-01836-JC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/26/20
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant, Aluminum Co. of America Davenport Works, filed an appeal from the February 18, 2020 (reference 01) Iowa Workforce Development (“IWD”) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 17, 2020. The claimant, Gregory O. Kerner, participated personally. The employer participated through Keli Price, human resources business partner.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer’s account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as an equipment operator beginning in 2007 and was separated from employment on January 29, 2020, when he was discharged for abuse of FMLA.

The claimant applied for and was approved for intermittent FMLA in September 2019. The employer works with a third party administrator with FMLA requests. After concerns that the claimant was calling off during warm or nice days repeatedly, an investigator from the third party administrator began an investigation on January 9, 2020.

The claimant and his spouse also own a food truck, which operates on his personal property. On January 9, 2020, the claimant called off work and took FMLA. It was also an unseasonably warm day, approximately 60 degrees. In the evening, the claimant's wife asked him to come to the truck to help a customer with a question she could not answer. The claimant had been in bed. The claimant stated it was unusual for his wife to come get him, so he went out to the truck. When out there, he asked the customer in question if he could help. He stated the female customer pointed to the menu and inquired about gluten-free items, so he exited the food truck and met her at the front where she was standing to see.

At the same time, his wife commented that the customer had taken a phone out and appeared to be taking photos of the claimant. He assumed the customer was snapping photos of the menu, which was not unusual. He answered her questions, returned to the food truck and prepared himself dinner before returning back to the house and to his bed. He saw the female customer already had food, and did not serve her, and did not appear to be with anyone. He observed she went to her car, where she remained for some time. He estimated he was at the truck for ten to fifteen minutes. The claimant acknowledged that if he took FMLA time from the employer and then worked at his personal business, that it would constitute fraudulent behavior, but denied that as the case on January 9, 2020.

The employer reported the third party investigator produced photos reflecting the claimant was working while claiming to be off for FMLA, and had worked for approximately thirty minutes in front of the investigator, who was a male. The investigator also stated the claimant personally served him food. Upon receiving this information, Ms. Price met with the claimant for her own investigation and was told by the claimant that he had gone to the truck briefly to check on his wife and son but did not perform work. The employer did not present any policy, photos or investigation for the hearing. The claimant was subsequently discharged.

After the claimant was discharged, the employer rehired the claimant effective February 3, 2020 and he is still employed.

The administrative record reflects that claimant has a weekly benefit amount of \$518.00 but has not received unemployment benefits since filing a claim with an effective date of January 26, 2020. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

“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(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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 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. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

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.*

In the case at hand, the claimant appeared personally, provided sworn testimony, answered questions, and subjected himself to the possibility of cross-examination. In contrast, the only evidence in support of the employer was hearsay evidence, with no accompanying documentation, investigation report or photographs (as referenced as evidence) to support the claimant was performing work on January 9, 2020 at his personal business while also claiming FMLA from this employer. In the absence of any other evidence of equal weight either explaining or contradicting the claimant's testimony, it is held that the weight of evidence is established in favor of the claimant. Assessing the credibility of the witnesses and reliability of

the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Honesty is a reasonable, commonly accepted duty owed to the employer. If the claimant did work at his personal business on January 9, 2020 while also claiming FMLA from this employer, it would indeed constitute misconduct. But the employer failed to present sufficient evidence to corroborate that indeed the claimant was performing work that day on the food truck, besides answering a question for a customer, after leaving his bed, at his wife's request, so he could help the customer. The evidence was even disputed as to whether the investigator was male or female. In the absence of any documentation, photographs or other evidence, the administrative law judge is not persuaded the claimant's ten or fifteen minutes on the food truck, which was located on his personal property, was dishonest or fraudulent.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to job related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot. (At this time, the claimant had not received any benefits.)

DECISION:

The unemployment insurance decision dated February 18, 2020 (reference 01) is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.



Jennifer L. Beckman
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March 27, 2020
Decision Dated and Mailed

jlb/scn