

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SUZANNE D AKERS
Claimant

PETROLEUM SERVICES COMPANY LLC
Employer

APPEAL 19A-UI-01825-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/03/19
Claimant: Appellant (1)

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 February 19, 2019, (reference 01) unemployment insurance decision that denied benefits based on her discharge for wanton carelessness. The parties were properly notified about the hearing. A telephone hearing was held on March 27, 2019. Claimant participated and testified. Employer participated through District Supervisor Ashely Schreiner and Food Service Manager Kristen Goldsberry. Employer's Exhibits 1 through 10 and claimant's Exhibits A through C 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 began working for employer on July 8, 2017. Claimant last worked as a full-time kitchen manager. Claimant was separated from employment on January 30, 2019, when she was discharged.

The employer has a process in place in which it conducts internal food and kitchen safety inspections. On July 25, 2018, Goldsberry visited claimant's location to conduct an inspection. Goldsberry found there were no thermometers to ensure food was properly temperatured, that products on the prep table and walk-in cooler were not properly sealed or dated, that floors and surfaces were not being cleaned, and that expired products had not been thrown away. (Exhibit 2). These findings resulted in a failing inspection. Goldsberry advised claimant on the items she needed to correct and informed her she would be back to perform another inspection in 30 days. When Goldsberry returned all of the issues had been resolved. Goldsberry advised claimant that she needed to continue to ensure proper food and kitchen standards were being followed and that she would return for another inspection in six months. Goldsberry also advised claimant that if she failed another inspection she could be discharged from employment. Claimant denied being warned of discharge if the issues in the kitchen persisted.

On December 21, 2018, the kitchen underwent a county inspection, which found many of the same issues identified by Goldsberry back in July 2018. (Exhibit 3). On January 22, 2019, Goldsberry returned to claimant's store for her follow-up inspection. Goldsberry again found many of the same issues present during the July inspection, including undated food product, unsealed containers of food, and expired products. (Exhibits 6 and 8). Goldsberry immediately notified claimant's supervisor, Keith Kuehl of what she had found. Claimant testified the conditions in which Goldsberry found the kitchen area were not typical and that she could not control what employees were doing when she was not there.

On January 28, 2019, Kuehl issued claimant a final written warning regarding her attitude at work. (Exhibit 4). The warning noted that claimant continued to display a negative attitude and cited an example from Goldsberry's inspection in which another employee reported claimant told her not to write down wasted food items because it was Goldsberry's job to know what those were. The warning advised claimant that further infractions would result in termination. Two days later, claimant was discharged. The employer's witnesses testified claimant was discharged due to the ongoing poor condition of the kitchen, though the discharge notice did also mention issues with claimant's overall attitude while at work.

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 by the parties, 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 claimant's testimony that Goldsberry's findings on January 22, 2019 were not the normal state of the kitchen is not consistent with Goldsberry's prior inspection in July or with the December 2018 county inspection. Claimant's testimony is also contradicted by the photographic evidence showing expired food items Goldsberry found during her inspection.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer also has a duty to the public to ensure the food it serves is held and prepared in a safe manner. The employer has presented substantial and credible evidence that claimant continued to have issues with the safety and cleanliness of the kitchen area after having been warned. Following the July 2018 inspection claimant was advised by Goldsberry that she may be terminated if she failed another inspection. Despite these warnings, claimant continued to engage in similar behavior. This is disqualifying misconduct.

DECISION:

The February 19, 2019, (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 has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs