

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TODD A MULHERN
Claimant

KELLY SERVICES INC
Employer

APPEAL 15A-UI-04671-EC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/29/15
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant/appellant, Todd Mulhern, filed an appeal from the April 10, 2015, (reference 01) unemployment insurance decision that denied benefits based upon misconduct. The parties were properly notified about the hearing. A telephone hearing was held on May 29, 2015. The claimant participated. The employer, Kelly Services, Inc., participated through Meghan Erhart, Sr. Recruiting Specialist; and Lori Smith, District Manager. This administrative law judge took official notice of two documents in the Agency's administrative record for the limited purpose of verifying the dates, signatures, and contents of the written warnings issued to the claimant, dated October 1, 2014 and March 27, 2015.

ISSUE:

Was the claimant discharged from his employment for misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: the claimant, Todd Mulhern, was employed full-time as an assembly worker from May 29, 2014, until his separation from employment on March 27, 2015. He worked at Timberline Manufacturing. His employment was terminated because of his work performance and because of his insubordination toward his supervisor. (Erhart testimony) He had been previously warned regarding his insubordination.

On September 18, 2014, the claimant was warned about his insubordinate and disrespectful attitude toward his team lead. On September 23, 2014, the claimant was warned about his disrespectful attitude toward the company owner. On October 1, 2014, he received and signed a final written warning, relating to his disrespectful attitude toward his supervisor.

In March of 2015, the claimant knew or should have known that his employment would be terminated if he continued his disrespectful insubordinate attitude. He was made aware that his job was in jeopardy. (Erhart testimony)

On March 17, 2015, the claimant made a large error in his work performance, requiring rework of 51 of 70 items. His errors cost the company time and money. Then, his argumentative and insubordinate attitude following his costly work performance error led to the second reason for his termination. (Erhart testimony) He received and signed a final written warning on March 27, 2015.

The claimant alternately denied and admitted signing the written warnings described above, and then admitted that he “signed something.” He minimized the work performance error and stated that it was a team project, not his responsibility. (Mulhern testimony)

The exhibits clearly show that Todd Mulhern received and signed the written warnings dated October 1, 2014, and March 27, 2015.

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 § 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.

Iowa Admin. Code r. 871-24.32(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 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 the 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.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *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). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

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. However, if the employer 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.

It is my duty, as the administrative law judge and 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, as the finder of fact, may believe all, part or none of any witness 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

In determining the facts, and deciding what testimony to believe, the administrative law judge may consider the following factors: whether the testimony is reasonable and consistent with other evidence he or she believes; 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I find the employer's version of events to be more credible than the claimant's recollection of those events. The claimant demonstrated an argumentative and disrespectful attitude towards the other participants in this hearing. He alternately denied signing the written warnings and then admitted that he "signed something." He minimized the work performance error and stated that it was a team project, not his responsibility.

Specifically, I believe that the claimant was previously warned, repeatedly, about his insubordinate and disrespectful attitude toward his supervisor, team lead and the company owner. He received and signed a final written warning on October 1, 2014.

In March of 2015, the claimant knew or should have known that his employment would be terminated if he continued his disrespectful insubordinate attitude. In other words, he was made aware that his job was in jeopardy.

On March 17, 2015, the claimant made a large error in his work performance, requiring rework of 51 of 70 items. His errors cost the company time and money. Then, his argumentative and insubordinate attitude following his costly work performance error led to the second reason for his termination.

The employer presented substantial and credible evidence that the claimant committed disqualifying misconduct. Benefits are denied.

DECISION:

The April 10, 2015, (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.

Emily Gould Chafa
Administrative Law Judge

Decision Dated and Mailed

ec/pjs