

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PATRICK B NZOMBO
Claimant

CHATHAM OAKS INC
Employer

APPEAL 17A-UI-11130-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/01/17
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 filed an appeal from the October 19, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 17, 2017. Claimant participated. Employer participated through director of community based services Jackie Smith-Duggan. Human resources vice-president Michelle Wray attended the hearing on the employer's behalf. Employer Exhibits 1, 5, and 6 were admitted into evidence with no objection. The employer offered Employer Exhibits 2, 3, and 4 into evidence. Claimant objected to Employer Exhibits 2, 3, and 4 because he does not believe they are accurate. Claimant's objections were overruled and Employer Exhibits 2, 3, and 4 were admitted into evidence. Official notice was taken of the administrative record, including claimant's benefit payment history, with no objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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: Claimant was employed full-time as a direct support professional from January 18, 2016, and was separated from employment on October 3, 2017, when he was discharged.

The employer has a written policy that prohibits employees from using the employer's vehicles for personal reasons. The employer also has a cellphone policy that prohibits employees from using their cellphone while working. Employer Exhibit 5. Claimant was aware of the policies.

On September 27, 2017, during claimant's scheduled shift, a client he was assisting wanted to go purchase cigarettes. Claimant used the employer's vehicle to transport the client to purchase cigarettes. On the way to purchase cigarettes, the client told claimant it was nice to get out of the house and it would be nice to drive around before going back to the house. After purchasing the cigarettes, claimant drove the client around the area. After driving around the area, claimant and the client returned to the client's resident. The client did not complain to claimant about driving around. The client thanked claimant for driving him around. Claimant and client were gone for less than hour. Claimant denied stopping anywhere with the client after purchasing the client's cigarettes on September 27, 2017. Claimant denied going to a strip mall on September 27, 2017. Claimant denied leaving the client alone in a vehicle on September 27, 2017.

Ms. Smith-Duggan testified that on October 2, 2017, a site supervisor had a discussion with the client and the client alleged claimant made a stop on September 27, 2017 to so claimant could conduct personal business. The employer then started an investigation regarding what happened on September 27, 2017.

On October 3, 2017, the employer met with claimant regarding what happened on September 27, 2017. Claimant denied what the client reported to the employer. Claimant told the employer that the client asked to go purchase cigarettes. Claimant told the employer that the only stops were at the request of the client. Claimant told the employer he was aware of the employer's vehicle policy. The employer then told claimant he was discharged.

On June 29, 2017, the employer suspended claimant for one day for using his personal cellphone while he was working. Employer Exhibits 1 and 6. Claimant was warned that his job was job in jeopardy. Employer Exhibits 1 and 6. On June 2, 2017, the employer suspended claimant for one day for using his personal cellphone while he was working. Employer Exhibits 3 and 6. On April 19, 2017, the employer gave claimant two verbal warnings. Employer Exhibits 4 and 6.

REASONING AND CONCLUSIONS OF LAW:

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

It is the duty of an 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'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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's 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).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits that were admitted into

evidence. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 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 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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 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. *Id.* 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). 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). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990); however, "Balky and argumentative" conduct is not necessarily disqualifying. *City of Des Moines v. Picray*, (No. ___-___, Iowa Ct. App. filed __, 1986).

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.

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). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). Although the employer conducted an investigation as to what occurred on September 27, 2017, it did not present a witness with direct, first-hand information regarding what happened on September 27, 2017. The employer chose to rely on Ms. Smith-Duggan's testimony about what the employer determined happened through its investigation; whereas, claimant provided credible, direct, first-hand testimony that he did not make any stops in the employer's vehicle on September 27, 2017 to conduct personal business. Claimant testified he did drive the client around after they got the client's cigarettes, but that was at the client's request. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of any job-related misconduct to rebut claimant's denial of said conduct. "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." Iowa Admin. Code r. 871-24.32(4). The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The October 19, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs