

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MATTHEW A SWIFT
Claimant

CELLCO PARTNERSHIP
Employer

APPEAL NO. 19A-UI-01572-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/20/19
Claimant: Appellant (1)

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated February 15, 2019, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on March 7, 2019. Claimant participated personally. Employer participated by Michelle Hills.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on January 16, 2019. Employer discharged claimant on January 17, 2019 because claimant made inappropriate gestures to his co-worker or customer after claimant had previously been placed on a final written warning for his inappropriate actions toward a supervisor.

Claimant worked as a solutions specialist for employer. Claimant had previously been a manager, but had been removed from that position as result of inappropriate comments to employees and guests. Claimant continued working for employer, but during the time as a solutions specialist still encountered comments from customers and managers that claimant had not acted appropriately. Claimant received a final written warning on October 5, 2018 when claimant did not follow the directive of his manager by walking out to smoke a cigarette when his manager asked him not to take a break at that time.

The last, most recent incident that led to claimant's termination occurred on December 21, 2018 when claimant showed his middle finger towards his co-worker and a customer when that customer remained shopping after the store where claimant worked had closed. The customer returned a survey indicating that they saw claimant flipping his middle finger either towards the customer or towards his co-worker. Employer found out about this customer complaint on December 24, 2018 and ordered a copy of the security images on December 26, 2018. On December 27, 2018 employer received the video which showed claimant actually showing his middle finger to the other two parties.

Employer then sent this matter up to corporate to approval of the termination of claimant. Said termination was to take place shortly after the first of the year, but claimant was off from work January 5, 2019 through January 15, 2019. After claimant returned to work, he was then terminated.

REASONING AND CONCLUSIONS OF LAW:

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(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.

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). The conduct must show a 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon supra*; *Henry supra*.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning unprofessional conduct. Claimant was warned concerning this policy.

The last incident, which brought about the discharge, constitutes misconduct because claimant had received multiple warnings about unprofessional conduct, but chose to act in an inappropriate manner again in front of a customer. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

The question of this matter being a current act is also addressed by the administrative law judge. Although a period of over three weeks occurred between employer's notice of the action, such period was extended by over ten days as a result of claimant's personal issues. Employer acted appropriately by delaying the termination until claimant returned to work. Employer shall not be penalized by not terminating claimant while claimant was off from work on bereavement.

DECISION:

The decision of the representative dated February 15, 2019, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/scn