

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

DEBORAH L ANDERSON
Claimant

GLOBAL SPECTRUM LP
Employer

APPEAL 18A-UI-00049-JC
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/26/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 22, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. An in-person hearing was held in Des Moines, Iowa, on January 23, 2018. The claimant participated personally. Claude Williams, former co-worker, also testified on behalf of the claimant. The employer participated by telephone through Diane Frischmeyer, director of finance. Claimant Exhibits A through D were received into evidence. 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.

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: The claimant was employed part-time as a building attendant and was separated from employment on November 27, 2017, when she was discharged.

The employer contracts with businesses and provides services to set up for concerts, banquets and events. The claimant was assigned to work at the convention center on November 23, 2017. The undisputed evidence presented was the claimant was not to move client items, and if there was an item creating an obstacle or safety concern, the claimant was to notify a manager to remove the obstacle (Claimant Exhibit B). The employer's policies specifically state that employees are expected to work in a safe manner and create safe conditions, report all unsafe conditions to management and that horseplay is not permitted (Claimant Exhibit B).

Approximately one week before the final incident on November 23, 2017, the claimant saw a motorized scooter had been moved into a hallway. The scooter was not property of the employer, but rather the employer's client, the convention center. The claimant did not report any concerns about the location of the scooter to her manager during the week or request that it be moved. On November 22, 2017, the claimant stated she became irritated by the placement of the scooter because she bumped into it while passing by with her cart, causing items to fall

off the cart. After bumping into the scooter, the claimant did not notify her manager that she felt it needed to be moved or was a safety concern.

The undisputed evidence is that on November 23, 2017, the claimant physically rode the scooter and moved it, without permission from the client or notifying her manager. The claimant acknowledged she was irritated by the placement of the scooter, since she had run her cart into it the prior day, but stated even with its placement, she could pass through with her cart to perform her job duties. Before moving the scooter, she called her manager, Nate Miller, who did not immediately respond. The claimant then decided she would move the scooter herself. She was observed by a lead worker, and other employees, who did not participate in the hearing, but reported their observations to the employer. The lead worker called out the claimant's name, and she then stopped the scooter. The evidence is disputed as to the distance the claimant drove the scooter (twenty to fifty feet versus one hundred feet) or whether she operated it recklessly so that she almost ran into another item located in the hallway.

The claimant then walked to Mr. Miller's office to report she had moved the scooter. According to the employer, the claimant stated the decision to move the scooter was "spur of the moment" and she wanted to see if the battery was charged. At the hearing, the claimant acknowledged she wanted to check the battery on it, that she was irritated by its placement but denied horseplay. She was sent home pending investigation and then discharged on November 27, 2017.

Prior to discharge, the claimant had been issued employer books and written rules (Claimant Exhibits A through D). The claimant was also issued final written warnings in June 2017 and April 2016, for taking food and creamer from a client's premises without permission. The claimant did not agree with the warnings, stating that others took creamer for coffee without discipline and that she took a discarded mandarin orange, but acknowledged she knew her job was in jeopardy based upon the final warnings. The claimant opined she was discharged in retaliation after reporting a safety concern in good faith.

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, 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).

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). 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).

This case rests on the credibility of the parties. 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). Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995).

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.* The administrative law judge had the ability to observe the claimant's appearance and conduct in person during the hearing. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as well as the claimant's demeanor and conduct at the hearing, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer's hearsay evidence to be more credible than the claimant. The employer has 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.

In this case, the employer had its employees work on site for its clients to set up events. As such, the employer had reasonable expectations that employees would not move items that did not belong to the employer, and that if they encountered an obstacle in completing their job, they were expected to report it to management, for movement. The claimant in this case, was aware of a motorized scooter located in a hallway for approximately one week, and did not report any concerns to her manager about the scooter. On November 23, 2017, the claimant decided she would physically move the scooter herself, in violation of the employer's rules, thereby triggering her discharge. Prior to the scooter incident, the claimant acknowledged she knew her job was in jeopardy based upon prior final warnings.

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). The administrative law judge is persuaded the claimant's decision to physically move the scooter was not the result of a good faith error in judgment or misunderstanding of the employer's policies, or even due to imminent harm. The claimant also indicated there was no emergency situation requiring her to move the scooter immediately, but she chose to do so, either to check the battery or simply make passing by easier.

Rather, the claimant acknowledged the scooter had been parked in its position for approximately one week, and the claimant had not reported it to her manager. The claimant also stated multiple times she was "irritated" by it, especially after she had bumped her cart into it the day before, causing items in her cart to fall off. Even if her manager did not respond immediately to her call on the radio, the claimant could have reasonably walked into his office to report the condition, just as she walked into his office after she moved the scooter. Based on the evidence presented, the administrative law judge concludes the claimant has not provided sufficient reason to mitigate her noncompliance with the employer's rules about reporting potential safety concerns and not moving client equipment. Therefore, the administrative law judge concludes that the claimant's discharge for moving the motorized scooter without authorization constitutes misconduct accordingly to Iowa law. Accordingly, benefits are denied.

DECISION:

The December 22, 2017, (reference 01) 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.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn