

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

GEORGE J GARWOOD
Claimant

E & P AUTOMOTIVE INC
Employer

APPEAL 16A-UI-08841-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/24/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 9, 2016, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on September 7, 2016. The claimant participated personally. The employer participated through Edward (Ned) Myers, co-owner. Subpoenaed witnesses included Wyatt Marsh (current employee) and Robert Kain (former employee.) Claimant exhibit A was 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 full-time as a store manager and was separated from employment on July 22, 2016, when he was fired.

The employer posts its store hours on its website as 7:30 a.m. until 6:00 p.m. Monday through Friday, and 7:30 a.m. until 5:00 p.m. on Saturday. Both former employee, Robert Kain, and current employee, Wyatt Marsh, acknowledged knowing hours of operation were until 6:00 p.m. during the work week. The claimant as store manager, was expected to run the store during its hours of operation. As part of the claimant's job duties, he was authorized and encouraged to send home one or both technicians around 5:30 p.m. if there were no car duties, to cut down on hourly labor costs. The claimant was never authorized to leave at 5:30 p.m. and as a salaried employee, would be paid the same amount whether he stayed and closed the store at 5:30 or 5:40 versus 6:00 p.m. The employer, however, could lose potential business if the doors were locked early, or no one was available to book appointments or field customer inquiries. At the hearing, the claimant asserted he was not told he must keep the store open until 6:00 p.m. but that it was "implied" and "recommended".

On May 5, 2016, the employer documented a verbal counseling with the claimant after being made aware from the district manager that the claimant was closing the store early. The claimant was permitted to send technicians home at 5:30, but the employer reiterated that the claimant was expected to keep the store open until 6:00 p.m., regardless of the claimant's position of "if I have to send technicians home, I'm not staying." Then, in June 2016, the employer was tipped off by a covering store manager, that the claimant was continuing to close the store early. The employer by way of Ned Myers, "staked out" the store and verified the claimant closing the store between 5:30 and 5:40 p.m. on June 20, 21, 22 and 28, 2016. The employer did not recall whether the claimant was immediately confronted. The employer at that time determined it would fire the claimant and on July 1, 2016, unbeknownst to the claimant, began training his replacement. During the period of July 1 through 22, 2016, the claimant continued to close the store early, and this was confirmed by Mr. Myers making repeated calls to the store and no one answering. He was subsequently discharged.

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).

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that 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 claimant discharged after repeatedly closing the store in advance of the 6:00 p.m. close time. The employer credibly testified that the claimant was warned verbally on May 6, 2016 and on numerous expectations that he was expected to be at the store until 6:00 p.m., regardless if he sent home technicians because business was slow. The administrative law judge is not persuaded that the hours of operation from 7:30 a.m. until 6:00 p.m. Mondays through Fridays were negotiable or that Mr. Myer's directives or expectations of the claimant keeping the store open until 6:00 p.m. were merely "recommendations" or "implied" as asserted by the claimant. Further, it cannot be ignored that both a former and current employee knew the expected close time was 6:00 p.m.

It is logical that the employer may encourage the claimant to send home technicians early, who are paid on an hourly basis, to cut labor costs, when business was slow. There was however, no benefit to the employer allowing the claimant to close up the shop whenever he felt business had ended for the day, in advance of the known business hours. Furthermore, the employer's business incurred harm by the claimant's actions, inasmuch as no one was at the store to field phone calls or take appointments of customers, or answer questions for any customer who stopped by the store, and would have found it closed, contrary to business hours posted on its website.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Based on the May 6, 2016 verbal warning alone, the claimant was aware he was expected to keep the store open until 6:00 p.m. The claimant repeatedly chose to close the doors early and leave, because he didn't feel like he should have to stay without technicians available to perform work. The claimant willfully and deliberately ignored Mr. Myer's directives or "recommendations." The claimant knew or should have known his conduct was contrary to the best interests of the expectations and interests of the employer. Based on the evidence presented misconduct has been established. Benefits are denied.

DECISION:

The August 9, 2016, (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.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/pjs