

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

RUSS E CRUSE
Claimant

BG RETAIL LLC
Employer

APPEAL 18R-UI-02830-DG-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/26/17
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated January 4, 2018, (reference 01) that held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on March 28, 2018. Claimant participated personally. Employer failed to respond to the hearing notice and did not participate.

ISSUE:

Was the claimant discharged for disqualifying job-related 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 December 1, 2017. Employer discharged claimant on December 1, 2017, because claimant did not perform job-related duties in a satisfactory manner.

Claimant began working for employer as a store manager in October of 2017. As a manager, claimant was expected to work with customers, and to manage day to day operations. On or about November 17, 2017, claimant was very busy helping customers at his store. Claimant noticed that a delivery driver was attempting to deliver inventory to the store. Claimant was not able to follow all the delivery procedures because he had a customer standing there waiting on him. Claimant took possession of the inventory, and then later that day he asked an employee to log those items into the store's inventory database. The employee put the items away, but did not log the items into the store's inventory database.

A member of employer's corporate office noticed that claimant's store inventory and the items delivered did not match. The matter was investigated and the employer discovered that claimant did not follow the proper procedures when he accepted the delivery on November 17, 2017. Claimant had never been warned about not following product delivery procedures, and he did not know he could be fired for making an inventory error.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 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 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.

Iowa Admin. Code r. 871-24.32(5) provides:

Discharge for misconduct.

(5) *Trial period.* A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the

employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

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. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. *Sallis v. EAB*, 437 N.W.2d 895 (Iowa 1989). *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that the term "excessive" is more than one. Three incidents of tardiness or absenteeism after a warning has been held to be misconduct. *Clark v. Iowa Department of Job Service*, 317 N.W.2d 517 (Iowa Ct. App. 1982). While three is a reasonable interpretation of "excessive" based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

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 upon such past act or acts. The termination of employment must be based upon a current act. A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

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).

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.*

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.

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 assess points or impose discipline up to or including discharge for the incident under its policy.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Verbal reminders or routine evaluations are not warnings.

Employer did not provide sufficient evidence of deliberate conduct in violation of company policy, procedure, or prior warning. Claimant's conduct does not evince a willful or wanton disregard of an employer's interest as is found in a deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees. Benefits are allowed.

DECISION:

The decision of the representative dated January 4, 2018 (reference 01) is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements. The benefits withheld based upon this separation shall be paid to claimant.

Duane L. Golden
Administrative Law Judge

Decision Dated and Mailed

dlg/scn