

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LARRY D GRAYSON
Claimant

HY-VEE INC
Employer

APPEAL 16A-UI-10621-H2

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/11/16
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 27, 2016, (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 October 19, 2016. Claimant participated. Employer participated through (representative) Jessica Thorne, Administrative Services Manager; Alison Wright, Human Resources Manager; and Kevin Jurasek, Director of the Ron Pearson Center. Employer's exhibit 1 was entered and received into the record.

ISSUE:

Was the claimant discharged due to job connected misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a set up person beginning October 25, 2010 through September 9, 2016 when he was discharged. The claimant was discharged for repeated violations of the time and attendance policy, a copy of which had been given to him.

The claimant initially worked as a janitor/set-up person at the Ron Pearson Center with the designation of lead worker. Under the employer's policies, lead workers are not considered supervisory positions. When the employer decided to redesign the Ron Pearson Center upper management decided that the positions of janitor and set-up person would be split and each position would report to different managers. The claimant, along with all other employees, was assigned to work at a different location from July 2015 until February 2016 while the Pearson Center was being extensively remodeled. When the center reopened the claimant returned to work at that location, and was allowed to pick either the janitor job or the set-up person job. The claimant opted for the set up person job, knowing he would no longer be considered a lead worker. The claimant's rate of pay and number of hours worked per week were not reduced when his lead worker designation was eliminated. The claimant was never a supervisor. The claimant was not targeted or singled out for the change from lead worker to non-lead worker. The change was made so that management could more accurately supervise the differing job duties.

The employer has a written handbook and policy manual, a copy of which had been given to the claimant. Part of the employer's time and attendance policy requires that employees actually perform work duties while on the clock and that all employees follow the work schedule as set by their manager.

The claimant was given a verbal warning by his direct supervisor Rob Moore when he changed his work hours without permission on August 2. As with all set-up employees the claimant's work schedule varied based upon whether events were taking place at the center. On August 2 the claimant was scheduled to work from 10:00 a.m. until 6:00 p.m. On August 1 he asked his supervisor if he could leave work early at 4:00 p.m. on August 2. He was given permission to do so. At no time did the claimant ask his supervisor if he could come in early on August 2. The claimant punched into work two hours early at 8:00 a.m. on August 2. His actions constituted a violation of the time and attendance policy as he was not following the work schedule set up by his manager. There was no business need for the claimant to be to work early at 8:00 a.m. The claimant was not allowed to change his work hours without permission.

On August 17 the claimant was scheduled to begin work at 9:00 a.m. He arrived at work early, punched in on the time clock at 8:28 a.m. and began getting paid by the employer. After he punched in the claimant went to the cafeteria where he ate breakfast while he was on the clock getting paid. The claimant did not have permission to punch in early and was not working while on the clock. On that same day the employer learned what had occurred and gave the claimant a final written warning for violating the time and attendance policy. The claimant was placed on three day suspension from August 18th through August 23rd. The final warning clearly put the claimant on notice that if he violated the employer's policies again, he would be discharged.

The employer has security cameras throughout the workplace. The cameras record what occurs on the premises whether an employee is in the area or not. The security cameras were set to record rooms in the facility, and were not set specifically to record the claimant. The claimant was not targeted by the security cameras.

On August 30 at least one of the claimant's coworkers complained to the manager alleging that the claimant was not working but was on his phone or missing from the workplace. The employer began an investigation that included reviewing surveillance videos of the workplace. The video's showed that for the last one-half hour or more of his work shift on September 2, the claimant was not working, but was on his personal cell-phone or sitting in the mezzanine area doing nothing. His failure to work is a violation of the employer's time and attendance policy and is theft of time from the employer. The employer conducted and concluded their investigation and made the decision to discharge the claimant prior to the incidents of September 8. On September 8 the claimant did not answer his walkie-talkie when called to help perform job duties by his manager. By the time that incident occurred, the employer had already decided to discharge the claimant based upon what they had seen in the September 2 video surveillance. The claimant was discharged on September 9 for repeated violations of the time and attendance policy.

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).

The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. EAB*, 531 N.W.2d 645 (Iowa App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). The employer's time and attendance policy is reasonable. An employer can expect employees to work when scheduled to do so and can reasonably expect employees to perform job duties while being paid.

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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Failure to sign a written reprimand acknowledging receipt constitutes job misconduct as a matter of law. *Green v. Iowa Dep't of Job Serv.*, 299 N.W.2d 651 (Iowa 1980).

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.* The claimant's was not a credible witness in light of the video surveillance provided by the employer. No credible evidence supports the claimant's allegation that he was targeted for discharge by the employer. The surveillance video is credible compelling evidence that supports the employer's allegation that the claimant was simply not working when he was supposed to be.

The employer's evidence has established that the claimant was given repeated warnings about the need to follow the time and attendance policy. Claimant was given fair warning that he needed to change his behavior in order to preserve his employment. The employer's video surveillance evidence is persuasive as it does establish that for at least the last one-half hour of his work shift on September 2 the claimant did not perform any work for the employer. He wandered around the facility, talked on his cell phone and sat at a table in the mezzanine doing nothing. His actions are theft of time from the employer and are conduct not in the employer's best interests. The claimant's final warning just a few weeks prior, which included a three day suspension, put him on notice that failure to follow the policy would lead to his discharge. Claimant's repeated failure to follow the time and attendance policy after having been warned is evidence repeated violation of the employer's policy that rises to the level of disqualifying job related misconduct. Benefits are denied.

DECISION:

The September 27, 2016, (reference 01) 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. Inasmuch as no benefits were claimed or paid, no overpayment applies.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs