

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ROBERT J GROSS
Claimant

SEARS ROEBUCK & CO
Employer

APPEAL 16A-UI-13468-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/20/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 8, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 11, 2017. Claimant participated. Employer participated through human resources specialist Claudia Moon and manager Eric Simpson. Employer Exhibit 1 was admitted into evidence with no objection.

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: Claimant was employed full-time as a service tech 2, in-home service from August 17, 2015, and was separated from employment on November 15, 2016, when he was discharged.

Claimant received a copy of employer's written drug and alcohol use policy. The employer's drug and alcohol policy specifically states, "If you . . . refuse to grant permission for the test, you will be subject to immediate termination of employment." Employer Exhibit 1.

On November 15, 2016, claimant was approximately ten minutes late to a regularly scheduled meeting. After the meeting, Mr. Simpson pulled claimant into an office to discuss claimant's tardiness. During their conversation, Mr. Simpson observed that claimant's face was red and his speech was very slurred, which was out of the normal for claimant. During their conversation, claimant's speech became incoherent. Mr. Simpson then spoke with his manager and Ms. Moon. The employer decided to request a drug test based on reasonable suspicion. Mr. Simpson and claimant went out to the work van and Mr. Simpson explained to claimant that the employer was requesting claimant go to take a drug test and the reasons the employer was making the request. Claimant refused to take the test. Claimant told Mr. Simpson that he was not going to take the drug test. Mr. Simpson contacted his manager and Ms. Moon and informed them that claimant was refusing to take the test. The employer then explained to claimant if he did not take the test, he would be separated from employment. Claimant refused to take the test and he wrote out a statement refusing to take the test. Employer Exhibit 1. In claimant's written statement he stated, "I Robert J. Gross am refusing to take drug test at this

time due to possible findings but do not want to quit[.]” Employer Exhibit 1. During their conversation in and around the van, claimant asked Mr. Simpson questions about opportunities for rehabilitation. Mr. Simpson explained to claimant that he either had to take the test or he would be separated from employment. The employer then had claimant clean out the company vehicle and then claimant left. Later, on November 15, 2016, Mr. Simpson called claimant and told him he was discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to job-related misconduct. Benefits are denied.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit submitted. This administrative law judge finds the employer’s version of events to be more credible than claimant’s recollection of those events.

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 employer has the burden of proving disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Iowa Code § 730.5 allows drug testing of an employee upon "reasonable suspicion" that an employee's faculties are impaired on the job or on an unannounced random basis. It also allows testing as condition of continued employment or hiring. Iowa Code § 730.5(4). Iowa Code § 730.5(9) requires that a written drug screen policy be provided to every employee subject to testing. Upon a positive drug screen, Iowa Code § 730.5(9)(g) requires, under certain circumstances, that an employer offer substance abuse evaluation and treatment to an employee the first time the employee has a positive alcohol test.

The employer has substantially complied with the requirements of Iowa Code § 730.5. Although the employer does not provide training to supervisory personnel regarding drug and alcohol abuse, it was reasonable for Mr. Simpson to suspect something was wrong with claimant when claimant's speech was slurred to the extent it was incoherent at times. Furthermore, Mr. Simpson credibly testified that it was not normal for claimant to have this slurred speech.

Claimant did receive a copy of employer's drug and alcohol use policy, the employer requested he be tested based on reasonable suspicion (slurred speech), he was informed that if he refused to take the drug and alcohol test he would be separated from employment, and claimant refused to take the drug and alcohol test. Employees are required to be drug free in the workplace. The violation of the known work rule constitutes misconduct as it presents a safety hazard to the employee and the employer. Benefits are denied.

DECISION:

The December 8, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs