

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DAVID P. STEIL
Claimant

BIMBO BAKERIES USA INC.
Employer

APPEAL 23A-UI-06425-CS-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/14/23
Claimant: Appellant (5)

Iowa Code §96.5(2)a-Discharge/Misconduct
Iowa Code §96.5(1)- Voluntary Quit

STATEMENT OF THE CASE:

On June 24, 2023, the claimant/appellant filed an appeal from the June 15, 2023, (reference 03) unemployment insurance decision that denied benefits based on claimant voluntarily quitting on May 12, 2023. The Iowa Workforce Development representative determined the claimant voluntarily quit by failing to report to work for three days in a row and not notifying the employer. The parties were properly notified about the hearing. A telephone hearing was held on July 14, 2023. Claimant participated. Nicole Fitzgerald was present as a witness on behalf of claimant. Employer participated through plant manager, Aurelio Trevino. The employer called as witnesses Human Resources, Jennifer Nevers, and Production Manager, Terry Herver. Exhibits were submitted to the administrative law judge prior to the hearing. Claimant did not receive the documents. The employer elected to proceed with the hearing without submitting the documents as exhibits.

ISSUE:

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

FINDINGS OF FACT:

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.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds:

Claimant began working for employer on July 18, 2022. Claimant last worked as a full-time production supervisor.

The employer has a policy that requires supervisors to personally contact their manager on the manager's personal phone at least two hours prior to their shift to notify them if they will be absent. Claimant was aware of this policy through a prior warning he received on January 7, 2023. For any absences claimant was required to contact his manager, Terry Herver.

The employer also has a policy that if an employee does not call in or show up for three consecutive work days it is considered a voluntary quit. Claimant was also aware of this policy.

Claimant's work shift can vary according to the employer's labor needs. On May 4, 2023, claimant worked from 9:00 p.m. until 10:30 a.m. on May 5, 2023. Claimant's work schedule originally required him to work until 5:00 a.m. Claimant stayed until 10:30 a.m. to cover the shift of a supervisor that was absent from work. Claimant was then scheduled to work May 5, 2023, at 9:00 p.m. Since claimant has put in extra time in the morning a fellow supervisor agreed claimant did not to attend work at 9:00 p.m. Claimant verified this through an email with Mr. Herver and he agreed. Claimant did not call in or show up for his shift on May 5, 2023.

On Monday, May 8, 2023, claimant was scheduled to work at 9:00 p.m. At approximately 6:30 p.m., claimant's girlfriend, Nicole Fitzgerald, called into the employer's call in line to inform the employer claimant would not be at work. Claimant was in jail in Clayton County for an outstanding warrant. Claimant did not have his phone so he was not able to call the employer personally.

On Tuesday, May 9, 2023, claimant was scheduled to work at 9:00 p.m. Ms. Fitzgerald periodically called into the supervisor's general line but was not able to connect with anyone. At approximately 6:30 p.m. Ms. Fitzgerald called the employer's call in line to inform them claimant would not be at work. Ms. Fitzgerald also emailed Mr. Herver, that he would be absent. Claimant was released from Clayton County the same day. It was determined the warrant was an old warrant and claimant had previously served his required time but the paperwork had not been updated. No new charges were filed in relation to the arrest. Claimant attempted to contact the employer's supervisor's phone but was not able to connect with anyone.

On, Wednesday, May 10, 2023, claimant contacted the employer and informed them he would be returning to work. During this phone call Jennifer Nevers informed him that he was suspended for not communicating his absences to his direct supervisor on May 5, 2023, May 8, 2023, and May 9, 2023. On May 12, 2023, claimant was discharged for failing to communicate his absences to his direct supervisor.

On January 7, 2023, claimant received a written warning for failing to call the appropriate call in procedure. Claimant was informed that he needed to contact his manager in advance if he needed to use personal time off. Claimant was informed that any further violations of the policy would result in further discipline up to and including termination.

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 Code section 96.5(2)d 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:

d. For the purposes of this subsection, "*misconduct*" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

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.

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).

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 impose discipline up to or including discharge for the incident under its policy. 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). The focus is on deliberate, intentional, or culpable acts by the employee.

Claimant was discharged for failing to report his absences to the appropriate person. On May 8th and 9th claimant was absent and asked his girlfriend to call in to the employer’s call in line on his behalf. This call in line was not the appropriate phone number to call for supervisors when then needed to call in for work. Since claimant was a supervisor he was required to call his direct manager, Terry Herver, on his personal phone at least two hours prior to his shift. Claimant was previously informed of this procedure and received a written warning notifying him that he must call his direct manager in advance of the time off. Claimant was also warned that if he did not follow the proper procedure it would lead to further disciplinary action, up to, and including termination. Between the warning on January 7, 2023, and the time before his May 8th and 9th absences he had followed the proper procedure. However, on May 8th and 9th he did not. The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented substantial and credible evidence that claimant continued to violate the employer’s call in policy for supervisors after having been warned. Despite these warnings, claimant continued to engage in similar behavior. This is disqualifying misconduct.

DECISION:

The January 15, 2023, (reference 03) unemployment insurance decision is MODIFIED with no change in effect. The claimant did not voluntarily quit on May 12, 2023 by failing to report to work for three days in a row. 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.



Carly Smith
Administrative Law Judge

July 18, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.