

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**TROY S OTTERBECK**  
Claimant

**JOHN DEERE CONSTRUCTION  
EQUIPMENT**  
Employer

**APPEAL NO. 18A-UI-04509-B2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/18/18**  
**Claimant: Appellant (1)**

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Iowa Code § 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated April 6, 2018, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on May 4, 2018. Claimant participated personally. Employer participated by Clint Biekert.

**ISSUE:**

The issue in this matter is whether claimant was discharged for 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 January 25, 2018. Employer discharged claimant on March 19, 2018, because claimant had initiated multiple calls to employer where he was requesting to be put on workers' compensation because claimant's alcoholism was showing itself and claimant believed that treatment should be covered under workers' compensation as he believed it occurred as a result of improper treatment claimant received from his supervisor.

Claimant was upset at work with his treatment from his supervisor regarding hours and had started binge drinking. Claimant, while not at work, but while inebriated, called the medical staff of employer six times on January 24, 2018. Claimant wanted to be placed on workers' compensation while going in for treatment, but employer instructed claimant that his leave would be covered through workers' insurance instead. This frustrated claimant and he started repeatedly swearing at multiple workers for employer. Claimant called repeatedly to berate the workers, causing employer to try and block claimant's phone calls. Claimant reportedly told employer's doctor and nurses "fuck" multiple times and told another nurse that he understood why employer hired her when he heard her accent.

Claimant went on a leave for a period of time to address his alcoholism. On the date that he returned, he was terminated for his tirades.

Claimant had previously received suspensions for improperly filing for reimbursements on the purchase of work shoes and for not working mandatory overtime hours.

**REASONING AND CONCLUSIONS OF LAW:**

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 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).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). The conduct must show a 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon* supra; *Henry* supra.

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 Ct. 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*, 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. *State v. Holtz*, Id. In this matter, claimant admitted to not having a direct memory of many of the calls made on January 24, 2018, as he was intoxicated and didn't remember the statements. Claimant did admit to cussing on the phone on later calls as he'd gotten upset. As the claimant didn't have a specific memory and employer didn't have direct witnesses, the administrative law judge must weigh the non-memory of claimant versus the third party testimony of employer who chose not to have direct witnesses testify. In this matter, enough information was received that the administrative law judge is comfortable in stating that claimant acted completely and utterly out-of-line in the way he addressed 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.

Acts must be current acts in order to be reasons for discharge. In this matter, claimant's acts occurred the day before he went on leave. Employer is not held to have acted in a way that is not current when employer waited until the day claimant returned from treatment to terminate claimant.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning his offensive statements to multiple members of employer's medical department.

The last incident, which brought about the discharge, constitutes misconduct because claimant chose to call employer multiple times while intoxicated and chose to repeatedly speak in an offensive an inappropriate manner. Claimant's outrageous actions created a situation where employer was justified in skipping steps of the progressive disciplinary policy. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

**DECISION:**

The decision of the representative dated April 6, 2018, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

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Blair A. Bennett  
Administrative Law Judge

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Decision Dated and Mailed

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