

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DENISE L STONEBURNER
Claimant

MENARD INC
Employer

APPEAL 18A-UI-01796-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/14/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 2, 2018, (reference 01) unemployment insurance decision that denied benefits based on her discharge for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on March 6, 2018. The claimant participated and testified. The employer participated through attorney Alex Meyers and General Manager Travis Spiker. Employer's Exhibits A through F were received into evidence.

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 cashier from April 10, 2012, until this employment ended on January 12, 2018, when she was discharged.

On January 10, 2018, the employer received an email from a customer complaining about feeling ignored by the claimant while checking out in her line. (Exhibit D). According to the customer email claimant was typing on her phone when the customer approached the line. The customer reported claimant rang up her items, but then went right back to her phone. The customer further reported it had to prompt claimant to press the button on her screen to process the payment because she was on her phone and not paying attention to her screen. Finally, the customer complained the individual with her had to go back and get the receipt from the machine because claimant was busy talking to another employee as soon as she got off her phone. The employer's policies specifically prohibit cell phone use while at work. (Exhibit C). The policy is in place to avoid this very type of customer complaint. Claimant was aware of this policy. A review of the surveillance footage confirmed claimant was seen on her phone at 2:49:07 and 14 seconds later at 2:49:21, as well as approximately 40 minutes later at 3:32:04; 3:32:12; and 3:32:52.

Claimant denied she was texting on her phone and testified she was actually just trying to turn it off, because she did not realize it was on. Claimant testified she usually leaves her phone in an area designated by the employer for such purposes, but for some reason did not do so on this date. According to claimant, her phone began to ring while she was at the register. Claimant testified her phone, a Samsung Galaxy 7, requires you to input a passcode before you can answer or decline a call, turn off the ringer, or turn off the phone. Claimant further testified she was having difficulty entering her passcode, which is why she had her phone out for so long. According to claimant she took her phone out 40 minutes later in order to shut it off, as her previous attempts had been unsuccessful.

A meeting was held with claimant on January 12, 2018 to discuss the situation. Claimant testified she explained that she was just trying to turn her phone off to Spiker during this meeting. Spiker did not have any recollection of this explanation and there were no comments made to that effect in "Team Member Comment" section of the written documentation of the incident. (Exhibit F). The decision was then made to discharge claimant from employment. It was determined termination was appropriate given the seriousness of the incident – that it occurred in front of customers and that the customer felt ignored, having to prompt claimant for assistance. Claimant had no prior warnings.

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:

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.

871 IAC 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). 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. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). 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).

The decision in this case rests, at least in part, on the credibility of the witnesses. 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, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events.

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 was using her cell phone while she should have been helping a customer, her primary job duty at the time. This behavior shows a deliberate disregard for her job duties and the employer's cell phone use policy. Despite these warnings, claimant continued to engage in similar behavior. This is disqualifying misconduct.

DECISION:

The February 2, 2018, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs