IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

COLE D MARLOW Claimant **GREEN PLAINS RENEWABLE ENERGY INC** Employer	**APPEAL 17A-UI-10833-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/10/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 16, 2017, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 9, 2017. Claimant participated. Employer participated through human resources generalist Amanda Janicek. Employer Exhibit 1 was admitted into evidence with no objection. Official notice was taken of the administrative record, including claimant's benefit payment history and the fact-finding documents, 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 process operator from October 22, 2010, and was separated from employment on September 12, 2017, when he was discharged.

The employer has a written policy that prohibits employees from using their cellphone at work unless they are on a break. Employees are not allowed to carry their cellphones on their person unless they are on a break. The employer allows employees to take two fifteen minute breaks and a thirty minute lunch during each shift. Employees do not have set times they are scheduled to take their breaks. Employees take their breaks when they have the opportunity to. Claimant was aware of the employer's policies.

On August 11 and 14, 2017, claimant was observed using his cellphone in the operation manager's office. Claimant testified he was on break when he was on his cellphone. On August 25, 2017, after claimant's shift ended, he was leaving and noticed his radio was still in his pocket. Claimant went to take the radio out of his pocket but it slipped out of his hand and dropped to the floor. Claimant left the radio on the floor. On claimant's next shift, he explained to a manager what happened. On August 27, 2017, during claimant's shift, he was observed using his cellphone in the operation manager's office. Claimant testified he was on break when he was on his cellphone.

On September 6, 2017, claimant met with the employer regarding the four incidents that occurred on August 11, 14, 25, and 27, 2017. Employer Exhibit 1. The employer reissued claimant the performance improvement plan (PIP) he received in July 2017. Employer Exhibit 1. In this PIP, the employer again warned claimant not to be on his cellphone unless he was on a break. Employer Exhibit 1. In this PIP the employer also warned claimant not to take excessive breaks. Employer Exhibit 1. The employer warned claimant that his job was in jeopardy if he did not improve. The employer reiterated to claimant his target date for completion was October 12, 2017. Employer Exhibit 1. Claimant signed the reissued PIP on September 6, 2017. Employer Exhibit 1. After the September 6, 2017 PIP, claimant did not have any further violations.

On September 11, 2017, the employer decided to discharge claimant because it did not believe there would be any improvement in the future. On September 12, 2017, the employer told claimant he was discharged.

Claimant had multiple prior warnings. On February 10, 2017, the employer gave claimant a documented verbal warning for being on his cellphone when he was not on a break. Employer Exhibit 1. On June 6, 2017, the employer gave claimant a written warning for being on his cellphone when he was not on a break. Employer Exhibit 1. On June 26, 2017, the employer suspended claimant for three days for: being on his cellphone while not on a break, taking breaks right after he started, distracting other employees, and not performing tasks in a timely manner. Employer Exhibit 1. The employer instructed claimant that a PIP would start after he returned. Employer Exhibit 1. On July 14, 2017, the employer put claimant on a PIP for being on his cellphone when he was not on a break and for taking excessive breaks. Employer Exhibit 1. The employer gave claimant a target date for completion of this PIP as October 12, 2017. Employer Exhibit 1.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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 admitted into evidence. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

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.
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> 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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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). 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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). 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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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.

On September 6, 2017, the employer met with claimant regarding four incidents that occurred in August 2017. The employer reissued claimant the same PIP it did on July 14, 2017. The employer had claimant sign this reissued PIP on September 6, 2017. Employer Exhibit 1. The employer warned claimant his job was in jeopardy if he did not improve.

A warning informs an employee that if the conduct occurs again, they will be subject to further consequences. The employer failed to present any evidence that claimant committed any misconduct after September 6, 2017. Inasmuch as employer had warned claimant about the final incident on September 6, 2017 and there were no incidents of alleged misconduct thereafter, it has not met the burden of proof to establish that claimant acted deliberately or negligently after the most recent warning. The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Furthermore, the employer did not meet its burden of proof to show claimant committed disqualifying job misconduct in August 2017. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony or written statements from the employee(s) that observed claimant on his cellphone when he was not on a break on August 11, 14, and 27, 2017, but the employer instead choose to rely on Ms. Janicek's testimony. Claimant provided credible, first-hand testimony that when he was on his cellphone on August 11, 14, and 27, 2017, he was on a break. Claimant's testimony was corroborated by the evidence and testimony that he did not have set break times and would take his breaks when he had the

opportunity. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut claimant's denial of said conduct. "Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established." Iowa Admin. Code r. 871-24.32(4). The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The October 16, 2017, (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

_____
Decision Dated and Mailed

jp/rvs

NOTE TO EMPLOYER:
If you wish to change the address of record, please access your account at:
https://www.myiowaui.org/UITIPTaxWeb/.
Helpful information about using this site may be found at:
http://www.iowaworkforce.org/ui/uiemployers.htm and
http://www.youtube.com/watch?v=_mpCM8FGQoY