

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

JERRY PILCHER
Claimant

APPEAL NO. 16A-UI-05975-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

LOFFREDO GARDENS INC
Employer

**OC: 05/01/16
Claimant: Respondent (1)**

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Loffredo Gardens, Inc., the employer, filed a timely appeal from a representative's decision dated May 20, 2016, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on June 15, 2016. The claimant participated. The employer participated by Mr. Mike Bilez, Human Resource Manager. Employer's Exhibit A was admitted into the hearing record.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Jerry Pilcher was employed by Loffredo Gardens, Inc. from April 26, 2005, until May 4, 2016 when he was discharged from employment. Mr. Pilcher worked as a full-time delivery truck driver and was paid by the hour.

Mr. Pilcher was discharged on May 4, 2016 because of a driving incident that had taken place on April 28, 2016. On that date, a company reaction camera located in the truck's cab was triggered by the vehicle briefly swerving and striking an uneven road surface. The camera recorded the image of Mr. Pilcher glancing down for four to five seconds at a cell phone that he was holding in his hand while driving the company truck. The company had implemented a "zero tolerance" policy in August 2015 that prohibited drivers from using hand held cell phones while operating company trucks. The policy allowed the use of cell phones provided that the device had been placed in a dashboard mounted holder, or was being operated by a "Bluetooth" application. The company was advised of the activation of the recorder and its contents by the third party vendor and a decision was made to terminate Mr. Pilcher after the matter was reviewed by the company.

On the day in question Mr. Pilcher had entered GPS information via his cell phone while parked,

but the claimant had received a notification of a GPS correction while he was driving. Because Mr. Pilcher was near the location where the delivery was to be made, and there was no safe way to stop or quickly exit the two lane highway, he glanced at the cell phone's corrected information. While doing so, the truck slightly veered, causing the camera to record. Mr. Pilcher had been unable to place the cell phone in a dashboard mount or use the phone via Bluetooth because the company had not yet installed these devices on the truck that Mr. Pilcher was operating. Mr. Pilcher specifically informed the company the devices had not been installed and requested the company do so when he returned to the employer's facility after completing his duties on April 28, 2016.

In applying the zero tolerance rule, the employer had early on considered some mitigating factors when other drivers had violated the rule. The employer concluded, however, that Mr. Pilcher should be discharged because he had violated company policy and DOT rules by having the cell phone in his hand when he operated the truck and looking at the cell phone had caused him to deviate briefly from the road way.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes intentional disqualifying misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does not.

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 proof to establish disqualifying conduct on the part of a claimant. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct serious enough to warrant discharge is not always serious enough to warrant a denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employer. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees and an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. Unsatisfactory performance due to inability, incapacity or inadvertent isolated incidents or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. See 871 IAC 24.32(1)(a).

In the case at hand, the evidence in the record establishes that the claimant made an error in judgment in an isolated instance when he temporarily viewed a GPS correction on his cell phone as he operated the company truck. Personal cell phones are authorized to be used by drivers for communication and GPS information, providing that the cell phone is placed on a dashboard mount or a Bluetooth application is being used. On the day in question, the truck that Mr. Pilcher was operating was not equipped with either a dashboard mount or a Bluetooth application. Mr. Pilcher unexpectedly found himself near his destination in unfamiliar territory when he received a GPS correction. He quickly looked at the correction because he believed that he was nearing the destination and there were no reasonable alternatives such as pulling off the two lane road at that time. The company truck the claimant was driving had not been provided with a dashboard mount or Bluetooth capabilities.

The question before the administrative law judge is not whether the employer had a right to discharge Mr. Pilcher for this reason but whether the discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate Mr. Pilcher may have been a sound decision from a management viewpoint, the evidence in the record does not establish intentional, disqualifying misconduct sufficient to warrant the denial of unemployment insurance benefits. The claimant's conduct was an isolated instance of poor judgment considering the circumstances. Benefits are allowed, providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated May 20, 2016, reference 01, is affirmed. The claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs