

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PATRICK J MAYER
Claimant

HY-VEE INC
Employer

APPEAL 17A-UI-05426-JP

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 04/30/17
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 18, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 20, 2017. Claimant participated. Attorney Annie Galbraith participated on claimant's behalf. Ellen Sakornbut testified on claimant's behalf. Paralegal Hattie Holmes observed the hearing. Employer participated through human resources manager Lori DiRenzo, deli clerk Preston Miller, and kitchen manager Ryan Theesfeld. Hearing representative Barbara Buss participated on the Employer's behalf via telephone. Claimant requested the witnesses be sequestered. The employer did not resist claimant's request and the witnesses were sequestered. Claimant offered Claimant Exhibit A into evidence. The employer objected to Claimant Exhibit A because it was not relevant. The employer's objection was overruled and Claimant Exhibit A was admitted into evidence. Claimant offered Claimant Exhibit B into evidence. The employer objected to Claimant Exhibit B because it was not relevant. The employer's objection was overruled and Claimant Exhibit B was admitted 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 part-time as a dish room employee from October 8, 2011, and was separated from employment on April 30, 2017, when he was discharged.

The employer has a standard of conduct policy that requires employees to conduct themselves in a professional manner. Claimant was aware of the policy. The employer is required to maintain a sanitary work environment.

On April 28, 2017, as Mr. Miller was finishing up his scheduled shift he walked into the dishwashing room to get a trash liner. Claimant was the only person in the dishwashing room and he was standing up facing Mr. Miller when Mr. Miller entered. When Mr. Miller entered, he

observed that claimant was urinating into the floor drain. Mr. Miller was able to observe claimant's genitals while claimant was urinating. Mr. Miller testified he was 100% positive that he saw a stream of urine and claimant's genitals. Mr. Miller did not see a flashlight in claimant's hands. After Mr. Miller entered the room claimant moved and told Mr. Miller that Mr. Miller had startled him. Mr. Miller did not recall saying anything to claimant, he just went and grabbed the trash liner and left the room. Mr. Miller then finished his shift. After Mr. Miller finished his shift, he then called his direct supervisor and reported what he observed. Mr. Miller's direct supervisor reported the incident to Mr. Theesfeld. Mr. Theesfeld then called Mr. Miller and he told Mr. Theesfeld what he observed. Mr. Miller told Mr. Theesfeld that he had witnessed claimant urinating into the dishwashing room floor drain. Mr. Miller told Mr. Theesfeld that he saw claimant's genitals. Mr. Miller is the only employee that observed the incident. The employer had employees clean the dishwashing room after the incident was reported.

On April 29, 2017, Mr. Theesfeld explained to his supervisor what happened. Mr. Theesfeld's supervisor told him to wait and talk to Ms. DiRenzo on April 30, 2017. Mr. Theesfeld did not interview claimant on April 28 or 29, 2017.

On April 30, 2017, Mr. Theesfeld and Ms. DiRenzo met with claimant. The employer explained that a witness viewed him urinating in the dishwashing room floor drain. The employer did not ask claimant if he was urinating, but claimant denied urinating. The employer then discharged claimant.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to job-related misconduct. Benefits are denied.

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 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*, 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 exhibits that were admitted into evidence. This administrative law judge finds the employer's version of events to be more credible than claimant'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.

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).

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). 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).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer's rule requiring employees to conduct themselves in a professional manner is reasonable. The employer is also charged with maintaining a sanitary work environment. Claimant's argument that he was not urinating into the floor drain in the dishwashing room is not persuasive. Mr. Miller provided credible, first-hand testimony that he observed claimant's genitals and claimant was urinating into the floor drain. Mr. Miller also credibly testified that he did not see claimant with a flashlight.

The employer has presented substantial and credible evidence that on April 28, 2017 claimant was caught urinating into the floor drain by Mr. Miller. Claimant's conduct of urinating into the floor drain in the dishwashing room was contrary to the best interests of the employer. This is misconduct without prior warning. Benefits are denied.

DECISION:

The May 18, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs