

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

MELINDA M TRUDELL
Claimant

APPEAL 22A-UI-11891-DH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SMITHS PROFESSIONAL CLEANING SER
Employer

**OC: 02/27/22
Claimant: Appellant (2)**

Iowa Code § 96.5(1) - Voluntary Quit
Iowa Code § 96.5(2)a - Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a - Discharge for Misconduct
Iowa Admin. Code r. 871-24.1(113)c - Discharge for Violation of Rules

STATEMENT OF THE CASE:

Melinda Trudell, claimant/appellant, appealed the May 3, 2022, (reference 02) unemployment insurance decision that denied benefits due to an April 12, 2022, discharge for violation of a known company rule. Notices of hearing were mailed to the parties' last known addresses of record for a telephone hearing to be held on June 23, 2022, at 10:00AM. Claimant personally participated, as well as Phyliss Perez, claimant's mother and former employee of employer and former security guard of employer's client in question, and Jennifer Trudell, claimant's sister, and former employee of employer. Employer, Smith's Professional Cleaning Services, participated through Benjamin Burns, a co-owner. Judicial notice was taken of the administrative record. Employer inquired whether the fact-finding documents were a part of the administrative record. The parties were advised that on the back of the notice of hearing, there is language under "Documents and Exhibits" stating that "[d]ocuments submitted at the initial fact-finding interview are not made part of the record unless requested in advance by one of the parties." Since no request was made, they are not part of the record, but it does not prohibit anyone from testifying as to what was submitted.

ISSUE:

Was the separation a layoff, discharge for misconduct or a voluntary quit without good cause?

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence in the record, the undersigned finds:

Claimant started with employer December 2007. She was still employed when Mr. Burns acquired the company in 2018. Claimant was fulltime with a varied set schedule. Her job title was quality supervisor. Her last day worked was April 12, 2022. Employer offers cleaning services to clients who hire employer. The employer discharged claimant over the phone on April 13, 2022. The stated reason was for falsifying her timecard, which resulted in theft of wages as her reported hours for April 4-8, 2022, exceeded the hours reflected from swiping her badge on the client's scanners to access buildings or pass the security guard gate to enter/exit the main

campus of the client in question. Employer provided the times that the scanners showed for each day and the times reported on the timecard, with the timecard having 297 minutes more time reported than the badge scanning.

Employer has an employee handbook. Mr. Burns does not know when claimant was given a copy prior to him purchasing the company, but since 2018, claimant would have received a copy of the employee handbook three times from 2018. Employer did not submit any of the company policies for the appeal. Parties agree there is a policy that states to the effect of accurately reporting your time worked on your timecard. There is no employer policy regarding swiping or scanning one's badge on the scanner at the client's facilities at the start of work and end of work to reflect one's work time.

Claimant and her witnesses all testified regarding not all building that are cleaned are within the campus that has one entering and exiting past a guard gate with a scanner. Not all buildings have a scanner to be scanned. There are times when one is working, and one has not scanned their badge. Timesheets are on the honor system. There is no policy of employer to scan in first thing at start and last thing when leaving. Safety training covered, in part, to scan in when can so one's whereabouts can be tracked for safety reasons if something happens.

Claimant was filing weekly claims for unemployment, reporting her wages earned, due to being employed fewer hours than her original contract for hire.

REASONING AND CONCLUSIONS OF LAW:

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

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.

Iowa Admin. Code 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.

Iowa Admin. Code r. 871-24.1(113)c provides:

(113) Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

c. *Discharge*. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

Iowa Admin. Code 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).

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). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

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).

Further, 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 law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Theft from an employer is generally disqualifying misconduct. *Ringland Johnson, Inc. v. Hunecke*, 585 N.W.2d 269, 272 (Iowa 1998). In *Ringland*, the Court found a single attempted theft to be misconduct as a matter of law.

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.

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, considering the applicable factors listed above, the fact claimant and her witnesses are all related, and using his own common sense and experience, the administrative law judge finds the claimant’s version of events to be more credible than the employer’s.

Employer has established there is a policy regarding properly reporting the time worked on the timecard. Employer has established the scan times total to less time worked than the time claimant reported on her timecard. Employer admits they have no policy in the employee handbook that addresses having to scan the badge at the client’s location at the start of work and end of work. While employer testified the client wants that done, and it is talked about as part of safety training, claimant and the two witnesses testified that is not what happens, there was no policy on this and

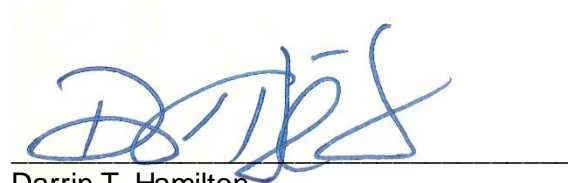
the training talks about scanning the badge when there are scanners, so if you need to be found, there is a record as to where you are at the client's facilities. Ms. Perez used to be a security guard for the client and testified that employer's staff on site to clean scan their badge when there were scanners available (not all buildings have scanners and not all buildings are within the campus covered by the two security guard gates. With no workplace policy regarding scanning at the beginning of and end of work, there was no workplace policy violated on the scanning issue. The analysis does not end here because if claimant intentionally overreported her hours worked, that would be theft and a violation of workplace rules.

Employer testified that he based his decision off of the scanning audit, showing when claimant scanned on the dates, earliest and latest (start/end times). However, employer has not proven they have a policy that requires this. Claimant and her witnesses saying this is not how it is done. One might otherwise start or finish where there are no scanners, outside of the guard gate with a scanner. Claimant asserts she was honest with her timecard reports and has no reason to lie on her timecard to get more hours at work than actually worked, as she gets paid at work and paid with unemployment. Claimant receives pay either way and reports her wages, with higher wages being lower unemployment. Claimant would rather have been back to her regular fulltime hours but was not. Claimant would not jeopardize her job nor risk trouble with unemployment by falsely reporting hours.

The employer has the burden of proof to establish misconduct. Employer has failed to meet their burden of proof in establishing any theft or attempted theft. No act to commit a theft was established by employer. While the employer may have had good reasons to let claimant go, there was no disqualify reason proven and no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The May 3, 2022, (reference 02) unemployment insurance decision that denied benefits due to an April 12, 2022, discharge is **REVERSED**. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



Darrin T. Hamilton
Administrative Law Judge

August 29, 2022
Decision Dated and Mailed

dh/mh

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> OR by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.