

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MANDY K CROSON
Claimant

NANCY LINCOLN
Employer

APPEAL 16A-UI-08588-DB-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/10/16
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the August 2, 2016 (reference 02) unemployment insurance decision that disallowed benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on September 19, 2016. The claimant, Mandy K. Croson, participated personally. The employer, Nancy Lincoln, participated through Owner Mark Lincoln; Office Manager Nancy Lincoln; Sales Manager Nate Lincoln; and Cashier Slade Roenfeld. Claimant's Exhibit A was admitted. Employer's Exhibits 1 through 7 were admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a pizza cook. This employer runs a convenience store. Claimant was employed from October 10, 2015 until May 6, 2016 when she was discharged from employment. Claimant's job duties involved cooking and cleaning. Claimant would also fill in for cashiers if they needed to take a break.

This employer has a verbal policy regarding use of the company telephone. The policy is that employees may only use the phone in case of an emergency or if they need to call for a ride home. Claimant was made aware of this verbal policy upon hire by Mrs. Lincoln.

This employer has a verbal policy that cooks are not allowed behind the cash registers unless they are covering for the cashier. This is due to distraction and the look of the store. Claimant was made aware of this verbal policy upon hire and by Nate Lincoln. This employer also has a verbal policy about not using profanity in front of customers.

Claimant was given several verbal warnings by Mrs. Lincoln regarding her personal use of the employer's telephone. Claimant was also given several verbal warnings about not being behind the cash register unless it was necessary to cover a cashier's job duties.

On January 19, 2016 claimant received a written disciplinary notice regarding performance issues. See Exhibit 1. On April 19, 2016 claimant received a written disciplinary notice regarding excessive use of the company phone for personal calls and standing and sitting behind the cash register area. See Exhibit 2.

On April 29, 2016 it came to the employer's attention that claimant used the company phone for personal calls for over sixty minutes during her four hour shift. Claimant testified that she used the phone to call her aunt who was in the hospital with her grandmother. Claimant testified that her grandmother came home from the hospital that day and passed away a couple days later. Claimant's notes submitted as Exhibit A indicate that her grandmother passed away on April 29, 2016. See Exhibit A (page 4).

Claimant was behind the counter with the cashiers on April 30, 2016 when she was not covering their job duties. See Exhibit 7. Claimant used profanity in front of a customer on April 29, 2016.

Claimant was scheduled to work on May 1, 2016; May 3, 2016; May 4, 2016 and May 6, 2016. Claimant was a no call no show on May 1; May 3; and May 4, 2016. Claimant came to work on May 6, 2016 and was discharged by Mrs. Lincoln.

Claimant was discharged for excessive use of the company phone on April 29, 2016; for use of profanity in front of customers; and for being behind the counter on several occasions when she was not supposed to be. See Exhibits 6 and 7.

REASONING AND CONCLUSIONS OF LAW:

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

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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).

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.

Further, 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). 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).

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, and using her own common sense and experience, the Administrative Law Judge finds that the Employer's witnesses are more credible than claimant.

Prior to her discharge claimant was verbally warned and received a written warning about her not being able to use the company phone for personal calls and not being behind the cash register when she was not covering for the cashiers. See Exhibit 2. Claimant was also told that use of profanity in front of customers was not allowed.

A lapse of a few days does not make an act a past act rather than a current act because claimant was told there would be a future meeting. *Greene v. Employment Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). Continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

The final incidents on April 29, 2016 involved three further violations of company policy, two of which included the exact same type of conduct claimant had been previously counseled about earlier that month (use of company phone and standing behind the cash register). Claimant's continued actions of failing to follow the employer's verbal policies constitute an intentional and substantial disregard of the employer's interest and is indicative of a deliberate disregard of the employer's interests. This conduct rises to the level of willful misconduct. As such, benefits are denied.

DECISION:

The August 2, 2016 (reference 02) unemployment insurance decision is affirmed. Claimant was discharged from employment for job-related misconduct. Benefits are withheld in regards to this employer until such time as claimant is deemed eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/