

IOWA DEPARTMENT OF INSPECTIONS & APPEALS
Division of Administrative Hearings
Wallace State Office Building
Des Moines, Iowa 50319

Appeal Number: 17IWDUI146
OC: 10/02/16
Claimant: Respondent (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

SHERRI D. MARION
10536 Forest Avenue
Clive, IA 50325-6649

IOWA WORKFORCE DEVELOPMENT
MARKETA OLIVER.
1000 E. Grand
Des Moines, IA 50319-0209

JONI BENSON, IWD
JODI DOUGLAS, IWD
NICHOLAS OLIVENCIA, IWD
EMILA CHAFA, IWD

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor Lucas Building, Des Moines, Iowa 50319.**

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.

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.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to the Department. 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. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

January 17, 2017
(Dated and Mailed)

STATEMENT OF THE CASE

Sherri Marion filed an appeal from a rdecision issued by Iowa Workforce Development ("IWD" or "employer") dated October 21, 2016 (reference 01) in which IWD determined that Ms. Marion was not eligible to receive unemployment insurance benefits. The decision stated Marion was discharged from work for insubordination. Marion's employer was Iowa Workforce Development.

The case was transmitted from IWD to the Department of Inspections and Appeals to schedule a contested case hearing. A Notice of Telephone Hearing was mailed to all parties on November 23, 2016 scheduling the matter to be heard on December 19, 2016. Thereafter, Ms. Marion requested the appeal be held in person. That request was granted and an Amended Notice of Hearing was issued on December 5, 2016, again setting the hearing for December 19, 2016.

Prior to the date of hearing, Iowa Workforce Development requested a continuance of the hearing date based on the availability of witnesses and inaccessibility of certain electronically stored evidence. The request was granted over Ms. Marion's objection and the matter was rescheduled for January 6, 2017.

On January 6, 2017 an in-person appeal hearing was held before Administrative Law Judge Kerry Anderson. Claimant Sherri D. Marion appeared, was self-represented, provided testimony. Employer IWD was represented by attorney Nicholas Olivencia. Mr. Olivencia called Ms. Marion as a witness in the Department's case, along with Vonnie Kai-Stewart, Dave Brown, Jennifer Reha, and Jason Landess. IWD submitted exhibits marked 1 – 9, all of which were admitted into evidence. Marion submitted Exhibits A through F, which were also admitted as evidence.

IWD also offered into evidence a video surveillance recording at hearing which Ms. Marion objected to on the basis she did not know whether this DVD was a copy of a DVD IWD had allowed her to watch earlier. At the close of the hearing the record was left open for Ms. Marion to view the video recording and offer an objection should it be other than the surveillance video she had been shown by the IWD earlier. There were difficulties viewing the recording but once Marion had the opportunity to do so, she offered an objection based on the tardiness of the introduction of the exhibit. That objection was overruled and IWD's Exhibit 10 was also made a part of the record.

ISSUE

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT

Background

Sherri D. Marion was employed by IWD from February 11, 1997 until the termination of her employment on July 26, 2016. Her position, at the time of her separation was "Workforce Advisor". She worked at the IWD office located at 430 E. Grand Avenue in Des Moines. A *Position Description Questionnaire* (PDQ) signed by Marion in 2013

describes her job duties as including working with employers with regard to their recruitment needs and meeting with regional economic development groups and chambers of commerce to market IWD services. However, toward the end of her tenure, IWD began to hire “Business Market Specialists” a position conceived of to assist employers at a “higher level”. As a result, Ms. Marion’s began to see changes in what was expected of her. A PDQ signed by Marion in May 2016; reflects those changes in that it describes her job duties as an office job; greeting and assisting customers and helping job seekers at the IWD office. (Exhs. 8, 9; Marion testimony; Brown testimony; Kai-Stewart testimony; Reha testimony)

Claimant Marion was part of a “Business Service Team”. Craig Immerfall served as the lead worker for the team, although he was not a supervisor. One of his responsibilities as a lead worker was to train and upgrade the skills of other team members. Prior to May 2016, Mr. Immerfall was preparing to retire and, in preparation of that, Immerfall conducted a training needs assessment to determine what types of training would be valuable for each team member. Claimant Marion told Immerfall she was interested in additional training. (Exh. 4; Marion testimony; Kai-Stewart testimony)

Dave Brown was hired by IWD in April 2016 as Ms. Marion’s direct manager. Marion knew Brown from his earlier employment with the Des Moines Public School System during which time they had professional contact. Mr. Brown was tasked with the responsibility of implementing the changes management was making in IWD’s approach to business services. Mr. Brown’s direct manager was Jennifer Reha. Ms. Reha’s direct manager was Jason Landess. Mr. Landess’ direct manager was Marketa Oliver. Claimant Marion knew that her chain of command began with Dave Brown, then Ms. Reha, to be followed by Mr. Landess, then Marketa Oliver and, finally, the executive director of Workforce Development, Elizabeth “Beth” Townsend. (Marion testimony; Brown testimony; Reha testimony; Exh. 4)

IWD held an “IowaWorks Integrated Spring Meeting” at the Forte Banquet Conference center on May 12 and 13, 2016. Prior to the conference, Jennifer Reha asked Dave Brown to attend and to select a few employees to accompany him. Mr. Brown notified one of the organizers of the conference he and three other employees would attend. Ms. Marion was not selected to attend the conference. No one discussed the conference with her nor did she even it was taking place until the first day of the event. (Marion testimony; Brown testimony; Exh. 7)

During the afternoon of May 12, 2016, Claimant Marion discovered the conference had begun that morning. According to Marion’s statements during an investigation by the agency, she found out about the conference from Business Market Specialist Vonnie Kai-Stewart during a conversation initiated by Marion who was trying to locate Craig

Immerfall. Marion stated that Kai-Stewart told her there was some training going on involving an apprenticeship grant and Immerfall was in attendance. Although she had not been invited, Marion decided to go to the conference because it sounded like something that would pertain to her employment. She arrived sometime after 2:00 p.m. At some point during a break in the afternoon, Ms. Marion saw Dave Brown and greeted him. At the end of the day, near 4:30 p.m., Brown drew Marion aside and expressed his surprise at her presence. (Marion testimony; Brown testimony; Exh. 4)

Claimant and Mr. Brown differ on the content of their conversation at the conference. Mr. Brown noted their interaction was tense. He explained he told Marion she had not been approved to attend the conference but Marion insisted she had been told by management she could attend any conference that pertained to her job duties and she did not have to get approval to do so. Brown characterized Marion as gritting her teeth and clenching her fists during their conversation. He stated she “demanded” to know how others were selected to attend the conference and threatened that she was going to the director of the agency to complain. According to Brown, he reiterated to Marion that she was not approved to attend the conference, that she should report to the office the following morning instead of returning to the conference, and that they could continue their discussion at the office. Brown stated that Marion continued to question him angrily until he stated their conversation was over and walked away. Mr. Brown explained that, as he walked away, Ms. Marion again stated she was going to speak to the director about the matter. (Brown testimony; Exh. 5)

Claimant Marion, on the other hand, testified that when Brown approached her he said he “didn’t think” she should be at the conference because she was “not on the list.” She; however, thought that, given her interaction with Craig Immerfall and his request for training needs for the Business Service Team, she was authorized to attend any training she felt pertained to her job. Ms. Marion testified she explained to Brown she believed she was on the list. According to Marion Mr. Brown said they would talk about the matter the next day. Marion testified Brown did not tell her she should not return to the conference the following day. She denied their interaction was other than pleasant. (Marion testimony; Exh. 4)

After Brown walked away from the conversation, Claimant Marion left the conference hall as well. At 4:53 p.m., Marion telephoned IWD Director Beth Townsend and left a voice message stating that she was being denied training and wanted to bring that to the director’s attention. (Marion testimony; Brown testimony; Reha testimony; Landess testimony; Exh. 5)

The following morning, Friday, May 13, 2016, Marion reported to her office just before 8:00 a.m. She remained there for some time but then left and returned to the

conference. According to Marion, she saw Mr. Brown when she returned to the conference and he did not say anything to her. Marion reported at hearing she assumed this meant he did not object to her attendance. Claimant explained that she knew Brown was relatively new to the agency and believed he had “checked things out” overnight and determined she was actually on the list to attend. According to Ms. Marion she stayed for the remainder of the conference based on her assumption Mr. Brown had decided she should be in attendance. (Marion testimony; Exh. 4)

On Monday, May 16, 2016, Jennifer Reha received notice from Director Townsend’s assistant, Diana Sisler that Sherri Marion had telephoned Director Townsend on May 12th and left the message she was being denied training related to her job. (Reha testimony; Exh. 5)

Investigation

On May 25, 2016, Ms. Marion was interviewed during an investigation into her actions surrounding the IowaWorks Integrated Spring Meeting. During the interview, Marion expressed her belief that, based on Mr. Immerfall’s inventory of training needs and a statement by former IWD Executive Director Teresa Wahlert that employees would receive any training necessary for them to do their jobs, she was entitled to attend the meeting without prior authorization from management. Marion further denied that Brown told her she could not attend the conference the following day and, instead said they would talk about the issue “tomorrow”. According to Marion she reported to Brown’s office the following morning at 8:00 to discuss the issue with him but he was not in and his office was dark. She waited for a while but he did not come in so she went back to the conference. Additionally, Marion first stated that Dave Brown was the only person she had discussed attendance at the conference with but, when confronted with evidence of her call to Executive Director Townsend, admitted she “vaguely” remembered telephoning her. However, Marion also stated she attempted to call or see Jennifer Reha before calling the director but admitted she did not follow her chain of command by contacting Jason Landess or Marketa Oliver before she called Townsend. (Exh. 4)

Craig Immerfall was interviewed on May 27, 2016. Mr. Immerfall explained that Business Service Team staff were required to seek approval before attending an “employer event”. He stated staff would usually discuss with him how the matter was relevant to their job and if he agreed it was, staff would contact Jennifer Reha and obtain her consent to attend. Immerfall was then asked:

Is it acceptable to-for staff to attend-Business staff to attend meetings without enrolling, without-or without-I'm sorry-without enrolling for those, such as a conference or a ...presentation? Is that typical?

Mr. Immerfall responded:

Certainly not; that's not appropriate whatsoever. In fact, I would have to add that, of all of the staff that work Business Services, Sherri's the only one that had done those types of things.

Mr. Immerfall went on to explain that Marion had attended events in the past without his permission or even speaking with him beforehand. However, when asked whether Marion was aware she was not supposed to do so, Immerfall answered: "I can't say that I'm aware that she knows. ... Just some of the reaction ... that she's received by me, you could infer, but I don't know if she specifically knows that she's not supposed to do that." (Exh. 4)

Immerfall also explained the needs assessment he had conducted for staff training for the purpose of making certain everyone on the team was promoting the same things with each employer with whom they met. Immerfall stated the training involved in that assessment was internal only and only resulted in a list of what types of training each team member needed as opposed to a list of specific training events each could attend. (Exh. 4)

Vonnie Kai-Stewart was interviewed on June 1, 2016. Ms. Kai-Stewart confirmed that, if a Business Service Team member wanted to attend a conference without using vacation, the member would ask for permission from his or her supervisor. Ms. Kai-Stewart denied knowing about the conference on May 12 and 13, 2016 before those dates. She was not specifically asked about any conversations she might have had with Marion during the afternoon of May 12th. (Exh. 4).

IWD presented Claimant Marion with a letter on June 10, 2016, placing her on administrative leave with pay pending the completion of the investigation. Marion's state-issued cell phone was taken from her at that time. (Exh. 4, 5)

A review of Claimant's phone showed she had downloaded various third party applications including, games such as Gummy Drop! and Farm Hero. Additional applications included were for Younkers, a retail department store, KCCI, a local television station, YouTube, The Bible, FaceBook, and LinkedIn. In addition several photographs had been taken with the phone including pictures and videos of an infant, and photos of a cat and the screen of a video slot machine. Finally, it appeared that

various telephone calls had been made to businesses not involved with Ms. Marion's duties at IWD, including one for internet drug coupons. (Exh. 5)

On June 17, 2016 Marion was interviewed concerning her phone usage. During that interview Marion admitted she had used her state-issued cell phone for personal purposes but stated that happened only on the rare occasion when the battery for her personal cell phone was low. Marion also admitted downloading non-work related apps. However, she explained she believed she could download free third party applications and she stated she thought she was allowed to use her work phone for non-work purposes as long as she did not do so habitually. (Exh. 4)

On June 23, 2016, Sherry Marion was interviewed a third time. Subjects included her cell phone usage and her attendance at the May 12th and 13th conference. Marion was shown a surveillance video that demonstrated she did not go to Dave Brown's office on the morning of Friday, May 13th as she had stated earlier. Marion stated she must have confused that day with another day when she had visited Brown's office. (Exh. 4; Exh. 10; Marion testimony)

On July 8, 2016, Claimant Marion was provided with a letter extending her administrative leave and continuing the investigation. (Exh. 4)

On July 25, 2016 Dane Saluntic was interviewed. Mr. Saluntic reported that he had received an email from his supervisor about the Integrated Spring Meeting prior to May 12th but did not attend on the first morning. According to Saluntic, he had a discussion with Vonnie Kai-Stewart on May 12th during which she reminded him of the event and he decided he should attend. Saluntic stated that Kai-Stewart dropped him off at the meeting. (Exh. 4)

Relevant Rules and Procedures

IWD's work rules¹ include the following provisions:

2. Work Performance – Employees will perform all assigned work in a competent, timely fashion within standards provided by management.

The following are prohibited:

¹The evidence shows that Claimant Marion was presented with a copy of these rules and signed an acknowledgement on March 31, 2014.

- a. Deliberate and willful refusal to follow the written or oral instructions of supervisory authority, or to carry out work assignments.

- h. Excessive personal use of smart phone, cell phone, or personal devices including texting, internet surfing, shopping, personal e-mail, Facebook, Twitter and any other use of social media unrelated to work duties during times other than authorized breaks.

3. Personal Action and Appearance

The following are prohibited:

- l. Lying while in the performance of official duties, during an investigation or making false, malicious statements about other employees, supervisors, or the agency.

(Exh. 2)

Additionally, the State of Iowa Employee Handbook² provides as follows:

Standards of Conduct

Use of State Property

Government-owned and private property on department work sites or other state premises must be protected. Therefore, the following are prohibited: ... unauthorized use, abuse, misuse, or waste of property or materialsThe State's long-distance service and state-owned cellular phones are to be used for official state business only. Local personal calls from state office phones must be kept to a minimum. ...

Disciplinary Actions and Your Rights

Disciplinary Actions

... Disciplinary actions, up to and including discharge, may be based on, but not limited to, any of the following reasons: ... insubordination, ...use or abuse of state property, ... dishonesty, ... misconduct, or any other just cause

² Ms. Oliver acknowledged receipt of these policies on July 21, 2015. (Exh. 2)

(Exh. 2)

Termination of Employment

Sherri Marion was presented with a letter terminating her employment on July 26, 2016. The letter stated:

... This action is being taken as a result of our investigation which revealed that you violated the following IWD rules and the State of Iowa Employee Handbook when you attended the Integrated Spring Conference on May 13, 2016, after explicitly being told by your supervisor that you were not to be in attendance; you misused your State-issued cell phone for personal use, including downloading numerous non-work related applications and taking pictures and videos for personal use; and you were dishonest during this investigation:

Marion filed a claim for unemployment insurance benefits with an effective date of October 2, 2016 and IWD protested it. The parties participated in a fact-finding interview and, on October 21, 2016 Workforce Development issued a benefits decision holding Marion was not eligible for benefits because she was discharged from employment for insubordination. (Exh. 9; Benefits decision) This appeal followed.

REASONING AND CONCLUSIONS OF LAW

An individual is disqualified from receiving unemployment insurance benefits if she has been discharged for misconduct in connection with employment.³ The employer has the burden of proving that the claimant is disqualified from receiving benefits because she was discharged for misconduct.⁴ “[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant.”⁵

Misconduct is a deliberate act or omission which constitutes a material breach of the employee’s duties and obligations. It is limited to conduct which demonstrates willful or wanton disregard of standards of behavior that the employer has the right to expect of employees, or in recurrent carelessness or negligence that manifests equal culpability, wrongful intent, or evil design, or that shows an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to the employer. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of

³ Iowa Code § 96.5(2) (2015).

⁴ Iowa Code § 96.6(2) (2015).

⁵ *Diggs v. Emp’t Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct.App.1991).

inability or incapacity, isolated incidents of ordinary negligence, and good faith errors in judgment or discretion are not misconduct.⁶

IWD argues that Sherri Marion engaged in misconduct based on the following actions: 1) attending a conference for which she was not approved the day after having been instructed by her supervisor not to return; 2) misusing her state-issued cell phone by downloading third party applications without approval; taking photos and videos of non-work related subject matter; and, making calls for non-work related purposes; and, 3) lying during the investigation into the first two allegations.

Whether misconduct justifies the termination of employment is an issue separate from the decision of what misconduct warrants a denial of unemployment benefits.⁷ Misconduct of a magnitude to justify the employee being fired may not necessarily be sufficient to warrant a forfeiture of unemployment benefits.⁸

Conference Attendance

With regard to the May 12th and 13th conference, there is insufficient evidence to demonstrate Marion's attendance on the afternoon of the first day constitutes misconduct under the statute and rules. It seems axiomatic that having not been informed of a work-related conference by one's manager, not having been asked by management to attend, and not being registered for a conference would translate into a realization one was not supposed to attend the conference. And the record is clear the general practice for all other Business Team Services members was to request permission from their managers prior to attending other than internal training sessions if doing so on work time. However, the record also shows that Sherri Marion did not follow the pack in this regard and made her own decisions about what meetings she would attend outside the office. Further, it appears Marion was never criticized for her failure to seek prior approval for meetings. Craig Immerfall, Marion's team leader, stated during the investigation he could not say whether Marion was aware her practice of attending events without prior permission was inappropriate and there is no other evidence in the record which would support a finding she did: the record is devoid of a written rule requiring prior permission, or of any discussions, counseling sessions or previous warnings directed at Sherri Marion with regard to this issue.

Marion's return to the conference the second day after her discussion with Dave Brown on the afternoon of May 12th is a separate issue. Willful misconduct can be established

⁶ 871 Iowa Administrative Code (IAC) 24.32(1)(a).

⁷ *Brown v. Iowa Dep't. of Job Service*, 367 N.W. 2d 305, 306 (Iowa Ct. App 1985) citing *Newman v. Iowa Dep't. of Job Service*, 351 N.W. 2d 806, 808 (Iowa Ct. App. 1984).

⁸ *Breithaupt v. Emp't Appeals Bd.*, 453 N.W. 2d 532, 535 (Iowa 1990).

where an employee manifests an intent to disobey the reasonable instructions of her employer *Myers v. Iowa Dep't. of Job Service*, 373 N.W.2d 507, 510 (Iowa Ct. App. 1985). Mr. Brown reported during the investigation and testified at hearing that he specifically told Marion not to return to the conference and to report to her office on May 13th. If Brown's testimony is believed, Claimant's action in attending the conference on May 13th constitutes an obvious manifestation of her intent to disobey those instructions.

Marion, on the other hand, contends while Brown told her he did not "think" she should be at the conference and she was "not on the list" to attend, he also told her they would discuss the matter the next day, leaving her with the impression he was going to further investigate her claim she was on the list for training. Marion claimed Brown never instructed her she was not to return to the conference on May 13th. If her testimony is believed, there can be no finding of willful misconduct.

There are many factors used when considering the credibility of witness testimony. Some of the most common standards are as follows:

1. Whether the testimony is reasonable and consistent with other evidence you believe.
2. Whether a witness has made inconsistent statements.
3. The witness's appearance, conduct, age, intelligence, memory and knowledge of the facts.
4. The witnesses' interest in the trial, their motive, candor, bias and prejudice.⁹

Here, I find Dave Brown's testimony as to the parties' discussion on the afternoon of May 12th to be more reliable than that provided by Sherri Marion. Ms. Marion clearly has a vested interest in the outcome of these proceedings: she would like to receive unemployment benefits.

Additionally, other evidence in the record as well as Ms. Marion's behavior at hearing demonstrated an exceptional unwillingness on her part to accept any instruction with which she does not agree. For instance, the record shows that in March 2016 Marion expressed a desire to become involved with the State Employees Health and Recreation Committee (SEHARC). On April 1, 2016, Marion sent an email to Jennifer Reha expressing that sentiment and Reha responded that she had checked on the matter and any involvement with SEHARC would have to be on Marion's personal time. Marion, unhappy with that response, sent Reha another email stating she did not understand this position and arguing that individuals involved in the "Employee Committee" for IWD

⁹ *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996) (citing Uniform Jury Instructions).

could use work time. Reha responded that IWD's employee committee was focused on IWD staff only while SEHARC is for all state employees. Marion countered with additional argument and another request that she be allowed to use work time for SEHARC activity. Not until Reha responded by quoting from SEHARC's website which acknowledges its volunteers work on their own time did Marion accept her manager's position. (Exh. 3) This unwillingness to accept an answer she does not like manifested itself on several occasions during the course of the hearing when, despite repeated instructions to the contrary, Ms. Marion insisted on arguing with witnesses each time they testified to something with which she did not agree.

However, it is Marion's conduct after she left the conference on the afternoon of May 12th that is most telling of the content of her conversation with Brown. Marion left the conference after it concluded at 4:30 p.m. and, at 4:53 p.m. she telephoned the executive director of IWD and left a message stating she was being denied training that was necessary for her job. This was extraordinary: Marion completely disregarded her chain of command which included, after Dave Brown, Jennifer Reha, Jason Landess, and Marketa Oliver. If Marion had truly believed Brown was simply going to look into the matter and that he would discuss it with her the next day, there would have been no reason to take such drastic measures.

Based on the foregoing, I find that on May 12, 2016, Sherri Marion was instructed by her immediate supervisor, Dave Brown, she was not return to the Integrated Spring Meeting the following day and, in direct defiance of that instruction, she did exactly that. In this regard, Marion's actions clearly constituted insubordination which justified the termination of her employment.

However, the issue does not end there. As noted above, misconduct justifying a denial of unemployment benefits is "... 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 ...".¹⁰ The Iowa Court of Appeals has specifically held that "[a]n employer has the right to expect an employee to follow his directions whether the directions are delivered by the employer himself or by his designated agent."¹¹ As noted above, Marion intentionally refused to follow her employer's directions as delivered to her by Dave Brown.

On the other hand, a "good faith error in judgment" will not warrant a denial of

¹⁰ 871 IAC 24.32(1)(a).

¹¹ *Myers v. Iowa Dep't. of Job Service*, 373 N.W.2d 507, 510 (Iowa Ct. App. 1985)

benefits.¹² The Court of Appeals has interpreted “good faith” in this context to mean mistaken action taken with the intent to fulfill the employer’s purpose.¹³

This is a close case: while the record shows Marion had a history of unreasonably questioning her employer’s directives, there is no evidence of any previous complete disregard of work directives. And, while Ms. Marion’s defiance of Brown’s instructions was clearly intentional, there is no evidence she was warned that returning to the conference would result in discipline. Finally, while Brown’s instruction Marion was not return to the conference the second day was certainly reasonable, it appears Marion’s reason for ignoring it was to obtain information she believed would help her in her job. It does not appear she had any willful or wanton disregard for IWD’s interests.

Based on these factors, the undersigned cannot find Marion’s attendance of the Integrated Spring Meeting on May 13, 2016 in direct defiance of her supervisor’s directive constitutes misconduct justifying a denial of unemployment benefits.

Phone Use

IWD also contends that Marion’s misuse of her state-issued cell phone constitutes misconduct justifying a denial of benefits. This is a much easier issue. At hearing, IWD admitted that, standing alone, Marion’s use of her cell phone for personal matters would not have constituted grounds for termination. If conduct does not warrant an employee’s firing, it cannot justify the denial of benefits. Ms. Marion’s use of her cell phone does not constitute misconduct in the magnitude necessary to deny unemployment benefits.¹⁴

Lying During Investigation

Finally, IWD contends Marion lied during its investigation into these matters and maintains that conduct warrants a denial of benefits. Again, the undersigned does not agree.

First, it IWD has not clearly set out exactly which statements of Ms. Marion it has determined are intentional misstatements. The termination letter provided to Marion on July 26, 2016 merely states: “... you were dishonest during the investigation” without providing specificity. During the meeting in which Marion was terminated she asked, prior to receiving the termination letter what she had said that was untruthful and Jason

¹² *Id.*

¹³ *Henry v. Iowa Dep’t. of Job Service*, 391 N.W.2d 731, 737 (Iowa Ct. App. 1986)

¹⁴ It should be noted that Marion’s justifications for downloading third party applications bordered on the ridiculous. For instance she maintained the Younkers application was work related because she needed to maintain a professional wardrobe and used the app to track clothing sales.

Landess responded:

And off the top of my head there was there was (sic) several things and we will provide you with some of that information that we had a written document if that deter-if that determine is made after you get done. Well I guess here if ... If that needs to be.

Ms. Marion asked Landess later in the meeting:

I was called in yesterday about-uhm-the other person who had-uhm-finally had driven over. Uh, what were the circumstances surrounding that? Did you find that? Is that what something that you saying is untruthful?

Landess responded by indicating that statements made by Vonnie Kai-Stewart and Dane Salunic during the investigation contradicted statements made by Marion. No other references were made to misinformation.

Finally, at the fact-finding hearing, while IWD indicated Marion was untruthful during the investigation, the report of the interview contains no specific statements which IWD believes to be lies.

The only specific allegation of Marion providing false information contained in the record is Jason Landess' contention that Marion's statements were contradicted by Vonnie Kai-Stewart and Dane Salunic. However, the statements provided by these two employees cannot be reconciled. Ms. Kai-Stewart testified she knew nothing about the conference and she was not specifically asked whether she and Marion discussed it. Dane Salunic testified Kai-Stewart did know about the conference and brought it up with him because she thought he would be going. In fact, Salunic stated that Kai-Stewart gave him a ride to the conference. Based on these discrepancies, the undersigned cannot find that they gave a unified version of the events of May 12, 2016 which contradicted Sherri Marion's statements about the same matters. There is insufficient evidence in this record to show that Marion intentionally provided false information during the investigation.

Having found the record does not support a finding Marion intentionally lied during the investigation, it must be noted that her memory of the events of May 12 and 13, 2016 was exceptionally fluid. For instance, Marion did not initially recall telephoning Beth Townsend until she was confronted with evidence of the call at which time she stated she "vaguely" recalled having done so. Marion also stated she went to Dave Brown's office on the morning of May 13 because she thought he would be there to further discuss her attendance at the conference but, after surveillance footage showed she did

not approach Brown's office on the morning in question, Marion stated she must have been mistaken, confusing May 13 with another morning. While the evolution of Marion's recollection of events is concerning, there is simply not enough evidence to support a finding she intentionally provided false information during the investigation and that allegation cannot serve as a basis for denying benefits.

Based on the foregoing, the October 21, 2016 IWD decision denying unemployment benefits to Sherri Marion should be reversed.

DECISION

Iowa Workforce Development's decision dated October 21, 2016 (reference 01), is REVERSED. The claimant is eligible to receive unemployment insurance benefits. IWD shall take any actions necessary to implement this decision.

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