

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**JEREMIAH E ORR**  
Claimant

**APPEAL NO. 18A-UI-01505-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**AG PROCESSING INC A COOPERATIVE**  
Employer

**OC: 12/17/17**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Jeremiah Orr filed a timely appeal from the January 25, 2018, reference 03, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Orr was discharged on December 15, 2017 for violation of a known company rule. After due notice was issued, a hearing was held on February 28, 2018. Mr. Orr participated. Michele Hawkins of Equifax represented the employer and presented testimony through John Dugger and Andrew Lester. Exhibits 1, 2, 5, 6, 7 and A were received into evidence.

**ISSUE:**

Whether Mr. Orr was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Ag Processing, Inc. operates a soybean oil refinery. Areas of the refinery are deemed "prohibited" areas due to the presence of highly flammable gas in those areas and the corresponding risk of catastrophic explosion. The employer prohibits use or possession of any tool or device in these "prohibited" areas that could cause a spark and trigger an explosion. The employer deems cell phones potential combustion ignition devices. To avoid having an employee enter a prohibited area with a cell phone, the employer prohibits unauthorized cell phone use throughout the refinery and requires employees to keep their personal cell phones in their personal vehicles outside the refinery.

Jeremiah Orr was employed by Ag Processing, Inc. as a full-time "utility" worker from August 2017 until December 14, 2017, when Sandy Mason, Director of Labor Relations & Security, discharged him from the employment in response to two incidents involving the presence of Mr. Orr's iPhone 7 cell phone in the refinery. Andrew Lester, Process Supervisor/Plant Supervisor, was Mr. Orr's immediate supervisor.

At the start of the employment, the employer provided Mr. Orr with a copy of the written Plant Work Rules. The Plant Work Rules contained a list of "serious conduct violations" that could result in immediate termination of the employment. Included in that list was the following: "Unauthorized use of cellular telephones, cameras or similar devices in prohibited areas." Though Mr. Orr received the work rules setting forth the above prohibition against unauthorized cell phone use in prohibited areas, the employer representative who handled Mr. Orr's orientation to the employment did not notify Mr. Orr at the start of the employment that he could not possess his cell phone *anywhere* in the plant or that he was required to keep his cell phone in his vehicle. Mr. Orr was under the belief that the prohibition against cell phone use in "prohibited" areas was due to the flammability of soybean dust.

On December 7, 2017, Mr. Orr worked in the "crude" unloading area. While working in that area, Mr. Orr stored his cell phone in a nearby desk. Mr. Orr turned his cell phone off and placed his cell phone inside a glove. While Mr. Orr was working in the area, Mr. Lester came through to check on the area and to make certain that the area was clean and loose items were put away. Mr. Lester opened the desk and discovered Mr. Orr's cell phone inside the glove. At that time, Mr. Lester told Mr. Orr that he could not have a cell phone *anywhere* on the refinery premises except in his personal vehicle. Mr. Lester directed Mr. Orr to take his cell phone to the waste water area. On that same day, Mike Rolo, Refinery Superintendent, summoned Mr. Orr to a meeting and issued a written reprimand to Mr. Orr. The written reprimand states the basis of the reprimand as follows: "On 12/7/17 at approximately 10am Jeremiah was caught by management with a cell phone in his possession at crude unloading. Cellular phones are strictly prohibited in this area and is a violation of company policy." The written reprimand further stated: "This is to serve as a written warning. Any further violations of Company Policy, Safety Rules or other Job Performance issues may result in further disciplinary action up to and including termination of employment." Mr. Orr signed the written reprimand. John Dugger, Refinery Operations Manager, signed the reprimand to indicate his approval of the reprimand.

On December 14, 2017, Mr. Lester and Matt Rogers, Production Assistant, went to the area of the refinery where Mr. Orr was working to investigate an oil leak on a fork truck. While Mr. Lester and Mr. Rogers were attending to the oil leak, Mr. Orr was standing a short distance away behind them. In that moment, Mr. Orr discovered that he had his cell phone on his person. Mr. Orr discovered the cell phone in his outside coat pocket as he was removing his work gloves from the pocket. Mr. Orr had not intentionally brought his phone into the plant that day, but had instead forgotten to remove the phone from his pocket before he entered the plant. As soon as Mr. Orr discovered he had the phone in his possession, he moved the phone in an inside coat pocket, zipped his coat and left the area to take his phone to his car. Mr. Lester had turned around in time to see Mr. Orr move his phone to his inside coat pocket and depart from the area. The weight of the evidence indicates that Mr. Orr did not *use* his cell phone in the presence of Mr. Lester and Mr. Rogers. Mr. Lester followed Mr. Orr and observed as Mr. Orr placed the phone in his car. Mr. Lester spoke to Mr. Orr at that time. Mr. Orr acknowledged that the phone had been in his possession while he was in the plant. Mr. Orr said it would never happen again and that he had placed the phone in his car. At about 1:00 p.m., Mr. Rolo summoned Mr. Orr to the waste water facility break room and told Mr. Orr that he was being placed on indefinite suspension.

On December 19, 2017, Sandy Mason, Director of Labor Relations & Security sent a letter to Mr. Orr. The letter stated that Mr. Orr was discharged from the employment due to the December 14 incident and the December 7 reprimand. The letter included the language of the written work rule that prohibited cell phone use in prohibited areas. Mr. Orr received the letter discharging him from the employment.

## REASONING AND CONCLUSIONS OF LAW:

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).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment 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 employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

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 Ct. 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.*

There were mitigating factors involved in both of the incidents that the employer considered when discharging Mr. Orr from the employment. First, the employer's *written* work rule is not the same work rule the employer enforced in connection with Mr. Orr's employment. The work rule prohibits "Unauthorized use of cellular telephones, cameras or similar devices in prohibited areas." The rule limits the prohibition against unauthorized cell phone use to "prohibited" areas and thus suggests the co-existence of *non*-prohibited areas. Mr. Lester's directive on December 7, that Mr. Orr take his cell phone to the waste water area, also indicates the existence of non-prohibited areas within the refinery. The written work rule does not prohibit *authorized* cell phone use in prohibited areas. The written work rule does not prohibit *use* of a cell phone in *non*-prohibited areas of the refinery. If the intent of the written rule had been to prohibit *any* use of a cell phone *anywhere* in the refinery, a reasonable person would expect the rule to state that and thereby put employees on notice of a blanket prohibition. The written work rule also does not prohibit cell phone *possession*. If that was the expectation, a reasonable person would expect the work rule to state as much and thereby put employees on notice of the expectation. The employer testified that the written work rule had been revised prior to Mr. Orr's employment, which means the employer has recently reviewed the work rule to make certain the rule stated what the employer wanted it to state. At the time of the December 7 incident, Mr. Orr was unaware that he could not *possess* his cell phone in his work area. Mr. Orr powered off the phone and safeguarded it in a desk in his work area. In other words, there was no safety risk. The weight of the evidence does not support the employer's assertion that Mr. Orr *hid* his phone on December 7. Rather, the evidence indicates only an intent to safeguard the presumably expensive and potentially fragile device. There is no evidence suggesting that Mr. Orr *used* his cell phone in the refinery on December 7. Though the

employer based the December 7 reprimand on purported violation of the written work rule, Mr. Orr did not in fact violate that work rule on December 7.

The weight of the evidence establishes that on December 7, Mr. Lester verbally notified Mr. Orr, for the first time, of a *different* employer work rule about cell phones. That newly-conveyed work rule was that Mr. Orr could not *possess* his phone *anywhere* in the refinery and had to keep the phone in his car outside the refinery. From December 7 forward, Mr. Orr was on notice of the prohibition against *possessing* a cell phone *anywhere* in the refinery. Given the nature of the employer's business, the prohibition was reasonable. From the time of December 7 written reprimand, Mr. Orr was on notice that merely possessing his cell phone in the refinery could lead to discharge from the employment. The weight of the evidence establishes that Mr. Orr was in violation of the prohibition against *possessing* a cell phone in the refinery on December 14, 2017. However, the weight of the evidence does not establish an intentional violation of the policy and does not support the employer's assertion that Mr. Orr *used* the cell phone in connection with the incident. The context of the incident, reason and common sense point toward Mr. Orr's version of the event being the more accurate version of what actually took place during the initial contact on December 14. The weight of the evidence supports Mr. Orr's assertion that he suddenly discovered he had the phone in his possession in the most inopportune context of his boss being present and that he immediately sought to discretely get into compliance with the employer's recently-conveyed policy. The weight of evidence fails to establish a *refusal* to comply with the employer's December 7 directive. The evidence establishes instead carelessness on the part of Mr. Orr in not assuring he had discarded the phone before he entered the refinery on December 14.

Because the evidence establishes neither an intentional disregard of the employer's interests or a pattern of careless and/or negligence indicating a similar intent, the administrative law judge concludes that Mr. Orr was discharged for no disqualifying reason. Accordingly, Mr. Orr is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

**DECISION:**

The January 25, 2018, reference 03, decision is reversed. The claimant was discharged for no disqualifying reason. The effective date of the discharge was December 14, 2017. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs