

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**PATRICK K STOKER**  
Claimant

**HY-VEE INC**  
Employer

**APPEAL 16A-UI-09057-JCT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 07/31/16**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the August 16, 2016, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on September 7, 2016. The claimant participated personally. The employer participated through Sabrina Bentler, hearing representative with Corporate Cost Control. Employer witnesses included Joann Peterson (human resources manager), Ryan Foster (market manager) and Dan McCutcheon (assistant manager). Claimant exhibit A and employer exhibit 1 were received into evidence. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**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: The claimant was employed part-time as a meat clerk and was separated from employment on August 1, 2016, when he was discharged for violating the employer's smoking policy (Employer exhibit 1).

The employer has a policy which prohibits employees smoking on the employer premises, and smoking while clocked in for work (Employer exhibit 1-C). The claimant was made aware of the employer's policies and procedures, including the smoking policy, at the time of hire (Employer exhibit 1-A and 1-B). In addition, in February 2016, the store location where the claimant performed work, developed a specific smoking policy that outlined in detail compliance with the employer's smoking policy (Employer exhibit 1E). Specifically, the policy states that violations may result in termination (Employer exhibit 1E). The employer reported the policy was posted next to the timekeeping system, though the claimant denied seeing it while employed. If employees want to smoke during work hours, they must clock out, and must go to their personal vehicle or to an adjacent street and must clock out.

Prior to discharge, the claimant was confronted on May 19, 2016, by Ryan Foster, for smoking on property and being clocked in, and the verbal warning was documented (Employer exhibit 1-F). The final incident occurred on July 28, 2016, when the claimant was again observed smoking behind the a/c unit on the premises. The claimant was clocked in. The claimant did not dispute smoking both times, but denied knowing he would be discharged and stated he had no vehicle to go smoke in. He was subsequently discharged.

## **REASONING AND CONCLUSIONS OF LAW:**

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

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).

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The employer's policies and procedures clearly state that employees are not to smoke while on the clock, nor on the premises, including behind the store (Employer exhibits 1-C and 1-E). The employer also posts the policy at the timekeeping system. The administrative law judge is not persuaded that the claimant did not know he could be fired for violating the employer's smoking policy. In essence, the policy is two-fold; an employee cannot be on the clock while smoking and cannot smoke on the premises. On at least two occasions, the claimant willfully and deliberately smoked, while on the clock, rather than clocked out for an appropriate break. Further the claimant smoke on the premises both in May 19, 2016 and on July 28, 2016.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). The credible evidence presented is that the claimant violated both facets of the employer's smoking policy on May 19, 2016, and was issued a verbal warning, as documented by Mr. Foster (Employer exhibit 1-F). The claimant knew or should have known his job was in jeopardy at that point for smoking on the job, but again was caught smoking on July 28, 2016, near the a/c unit. The employer has presented substantial and credible evidence that the claimant continued to smoke, while clocked in, and on company premises, after having been warned. This is evidence of deliberate conduct in violation of company policy, procedure, or prior warning. The employer's request was not unduly burdensome or unreasonable. Benefits are denied.

#### **DECISION:**

The August 16, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

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