

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

REYNA GUERRERO
Claimant

ABCM CORPORATION
Employer

APPEAL 18A-UI-07876-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/01/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 20, 2018, (reference 01) unemployment insurance decision that denied benefits based upon her discharge for conduct not in the best interest of the employer. The parties were properly notified about the hearing. A telephone hearing was held on August 13, 2018. Claimant participated and testified with the assistance of a Spanish interpreter from CTS Language Link. Claimant was represented by attorney Megan Rosenberg. Employer participated through Human Resource Coordinator Marilyn Moser and Dietary Manager Shannon Martzahn. Employer's Exhibits 1 through 8 were received into evidence.

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: Claimant began working for employer on April 6, 1994. Claimant last worked as a full-time dietary aid. Claimant was separated from employment on June 29, 2018, when she was discharged.

In December 2017 the employer began to notice claimant began regularly commenting on how tired she was. The employer also noticed a change in her work performance. Claimant was taking more than an hour to set up tables for lunch, when this task usually took approximately 20 minutes. It was also regularly reported that claimant was not washing her hands with soap and handling food with her bare hands. Claimant was issued a written warning on December 19, 2017. (Exhibit 1). In January 2018 claimant's hours were switched so that her start and stop times were a half hour later.

On June 22, 2018, claimant received a second written warning. (Exhibit 2). The warning noted claimant was having continued issues with getting the tables set up within a reasonable time frame and that it was still taking her around 45 minutes. The warning also outlined ongoing issues with claimant's failure to follow proper sanitary procedures, such as handling food with her bare hands and eating food without washing her hands afterward. There was also an

incident on June 15 where a resident was given an incorrect item. The warning advised claimant that she had until June 29, 2018 to improve these items or she would be discharged from employment.

On June 27, 2018 informal counseling was given to claimant, as she was still taking between 40 and 45 minutes to set up tables, was not following proper sanitary procedures, and had given another resident an incorrect food item. Claimant was reminded that she only had until June 29 to improve or she would be discharged from employment. (Exhibit 4). Martzahn testified, on June 29, she observed claimant begin table set up between 9:30 and 9:35 a.m. and she did not finish until 10:15 a.m. Martzahn and several other employees also observed claimant eating without washing her hands afterwards. (Exhibit 5). Based on this failure to improve, the decision was made to discharge claimant from employment. (Exhibit 3).

Claimant denied that she was eating food without washing her hands, or failed to follow other proper sanitary procedures, on June 29. Claimant further testified that she believed she had from 9:45 until 11:00 a.m. to get all the tables set up and that she was performing this task as quickly as she could. Claimant could not recall for certain if she ever gave residents the incorrect food or if she was warned her job was in jeopardy if she did not improve.

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 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.

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).

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.*

At several points in claimant's testimony she could either not recall certain events or provided contradictory testimony. The employer's witnesses, also at times seemed unsure about the timeline of events, but their testimony was generally bolstered by the other exhibits and written witness statements. After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented substantial and credible evidence that claimant continued to struggle with getting her work done within the allotted time and following proper sanitary procedures after having been warned. Claimant received numerous verbal warnings about this behavior from McCann and received a final written warning just a few weeks prior to her termination. Despite these warnings, claimant continued to engage in similar behavior. This is disqualifying misconduct.

DECISION:

The July 20, 2018, (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 she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs