

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN M ALBAUGH
Claimant

APPEAL NO. 11A-UI-15373-L

**ADMINISTRATIVE LAW JUDGE
DECISION**

KELTEK INC
Employer

**OC: 10/02/11
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 21, 2011 (reference 01) decision that denied benefits. After due notice was issued, a hearing was held on January 18, 2012 in Des Moines, Iowa. Claimant participated. Employer participated through COO Jamie Milligan, CEO Kelly Milligan, and Human Resources Assistant Alicia Perez. The administrative law judge took judicial notice of the administrative record (Fact-finding Interview, pages 1 – 18). Employer's Exhibit 1 (fax pages 1 – 26) was admitted to the record.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time sales person from January 1, 2011 through Friday, September 30, 2011 when he was discharged. On August 8, 2011 Perez had a verbal discussion with him about attendance and tardiness. (Employer's Exhibit 1, fax page 22) Claimant was tardy on Tuesday, September 27 and warned on the same date that his job would be in jeopardy if he were tardy again. (Employer's Exhibit 1, fax pages 9, 10) He was not. Claimant failed to keep his cell phone active at a trade show on Wednesday, September 28. He denied the employer had instructed him to provide one and the employer had no written evidence of any such agreement.

The employer also discharged him because of continued failure to meet more general goals. His employment goals were revised on June 30, 2011 (Fact-finding Interview, pages 15, 16; Employer's Exhibit 1, fax pages 23, 26) because earlier goals had not been met (Fact-finding Interview, page 17) but no documentation was maintained for the first six months' employment and the move was not disciplinary in nature. The plan was also changed for other business reasons unrelated to the separation. Weekly one-on-one sessions were held on July 6, 14, and 20, August 8, 17, 22, and 31, September 9, 20, and 27, 2011. On August 31, eight months after his hire, session notes referred to him as having been employed for "over a year" and still

not knowing the business' core product. (Employer's Exhibit 1, fax page 16) The initial goal notes referred to finalizing a "product checklist" and creating a "checklist for each show" but did not specifically refer to a "tradeshow checklist" until session notes on August 17, which also had a distinct reference to a "product checklist." (Fact-finding Interview, page 9) The tradeshow checklist appears in session notes again on August 22 referring to a September 9 final checklist deadline and a conflicting statement that the final version of the tradeshow checklist was not complete. (Employer's Exhibit 1, fax page 17) On August 31 the "finalize tradeshow checklist" was given a deadline of September 9 but was listed six lines down as not completed, even though the deadline had not yet been reached. The session notes on September 9 report that the employer "Moved tradeshow responsibility over to Kelly" and do not refer to any "tradeshow checklist" duties as having either been completed or not completed. (Employer's Exhibit 1, fax page 13) The tradeshow checklist reappears in the September 20 session notes with a new deadline of September 23 even though the line below refers to moving "tradeshow responsibility over to Kelly as on 9/9/11". (Employer's Exhibit 1, fax page 12) The "tradeshow checklist" is listed as not complete in the final session notes on September 27. (Fact-finding Interview, page 7) In the same session notes the employer specifies an Excel version of the tradeshow checklist should be completed by the time they meet again on Friday [September 30]. (Fact-finding Interview, page 8)

The goal notes also referred to ensuring dealers have current "literature." (Fact-finding Interview, page 15) On August 22 "send letter/literature to every [blank] location reintroducing" the employer as a supplier and "determine and set schedule for which locations to visit" were assigned deadlines of September 7. The evidence is unclear if that is the same plan as set forth in the goals. (Employer's Exhibit 1, fax page 18) The issue is mentioned again on August 31. (Fact-finding Interview, page 6) The task is listed as not having been completed by the date assigned on September 9, 2011 (Employer's Exhibit 1, fax page 13), lists it as complete in session notes dated September 20 (Employer's Exhibit 1, fax page 12), but it is referred to as not complete again in the final session before separation on September 27. (Fact-finding Interview, page 8)

A third goal note was to understand the product better. (Fact-finding Interview, page 16) On August 22 claimant was assigned to start phone canvassing shops that do not purchase from the employer by September 14 and was instructed to "Focus on [blank] product training by September 30. (Employer's Exhibit 1, fax page 18) The August 31 session notes repeat the reference to canvassing but do not mention product training. (Fact-finding Interview, page 6) The September 9 notes refer to a canvassing deadline change to September 21 and product training focus by September 30. Another task was added with a deadline of September 13 to draft three questions and five to ten bullet points for potential customers. (Employer's Exhibit 1, fax page 14) The canvassing and bullet points appear as not complete on September 27 and product training retained the September 30 deadline. The employer specifically notes that his "1 year anniversary coming up," even though it was three months distant and noted claimant had "not gained the knowledge that he needs," was not meeting his plan goals, and although the employer had addressed performance on two prior occasions, it was "only seeing minimal improvement." (Fact-finding Interview, page 8)

He did not get paper copies of the notes and did not recall that he was told his job was in jeopardy for any reason but the employer's only response was that he was verbally advised and he could have gotten access to the server that contained the weekly meeting minutes. Claimant had difficulty with very basic electronic, word processing, and computer issues throughout the documented session notes; (Employer's Exhibit 1, fax pages 3, 5, 7, 9, 10, 12, 19, 21, 22) although session notes on August 22 did report that claimant had completed tasks such as updating Excel spreadsheets and writing letters. (Employer's Exhibit 1, fax page 9, 13, 15, 17)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988). Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. IDJS*, 386 N.W.2d 552 (Iowa App. 1986). Evidence produced by one party used as evidence to support a conclusion in favor of the other party "does not diminish the

probative value of it." *Hy-Vee v. EAB*, 710 N.W.2d 1, ___ (Iowa 2006), citing *PanDa Eng'g v. Eng'g & Land Surveying Bd.*, 621 N.W.2d 196, 198 (Iowa 2001).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. The parties agree on little but that the claimant was discharged. After an exhaustive and pain-staking review of the fact-finding record and employer's exhibit, the ALJ concludes the claimant is the more credible witness as the employer's documents are internally significantly inconsistent and unclear as noted in the findings of fact above. Although employer's frustration with claimant's lack of performance was palpable at hearing, since the employer reported on September 27 in the final session notes that after eight months the claimant did not have a sustained period of time during which he performed his job duties to the employer's satisfaction, and inasmuch as claimant did attempt to perform the job to the best of his ability but was unable to meet its expectations, especially in the area of computer competence tied to various tasks, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The November 21, 2011 (reference 01) decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed. The benefits withheld shall be paid, provided the claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css