

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

STEVEN E SCHLEICHER
Claimant

ANAWIM INC
Employer

APPEAL 19A-UI-01662-H2T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/06/19
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the February 14, 2019, (reference 01) representative decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 12, 2019. Claimant participated. Employer participated through (representative) Holly Olson, Vice-President of Finance and Accounting and Andrea Baldwin, Senior Director of Asset Management. Official notice was taken of agency records.

ISSUE:

Was the claimant discharged due to job connected misconduct sufficient to disqualify him from receipt of unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a manager of property services beginning on August 21, 2017 through January 11, 2019, when he was discharged.

On January 10, 2019, the employer reviewed surveillance video of actions taken at a deceased resident's unit on January 4, 2019. The video showed the claimant and an employee who worked for him taking abandoned property out of the resident's unit and loading into their own personal vehicles. Earlier that morning, the claimant and the property manager for that location had walked through the unit to evaluate how much trash would need to be hauled to the dump. At that time the claimant also changed the lock on the unit. The family of the deceased resident had already been through the unit and told the property manager that they did not want anything that was left. The employer's expectations were that all of the remaining property would be bagged up by a maintenance technician and taken to the dump. The employer does not allow employees to take any items or things any resident leaves behind for their own personal use. The employer is concerned that if other residents see employees taking personal belongings from residents units, it would appear as though theft was taking place.

The claimant alleges that it was well known among workers, property managers, and his supervisor Phil Graham that employee's routinely took what they wanted from items left behind

by residents. Claimant had given permission to his underling to take items as he had been given permission by Mr. Graham to take items.

The employer's policy, a copy of which had been given to the claimant, prohibits theft or inappropriate removal of a resident's property. The policy does not further define what "inappropriate removal" means nor is explicitly stated anywhere in the policy that all items left behind or abandoned by tenants must be 'trashed' and taken to the dump.

The claimant's underling who was seen taking abandoned property from the unit was not discharged as he had been given permission from the claimant, his direct supervisor, to take items. That individual was given a written warnings and was specifically told he could not take anything, abandoned or not, from a resident's unit. The underling was later discharged for an unrelated issue.

Prior to his discharge, the claimant had no prior warnings for any behavior, and had in fact just been promoted and given a substantial pay raise. The claimant did not contact his immediate supervisor Ms. Baldwin to ask her permission to take any abandoned items because he believed it was not necessary.

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 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 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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). 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).

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.

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. *State v. Holtz*, 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. *State v. Holtz*, Id.

The administrative law judge is persuaded that the claimant was engaging in behavior that he believed to be allowed by Mr. Graham. Claimant's testimony that others, including property managers took abandoned property is persuasive. The claimant himself admits he told his underling he could take abandoned property. Both claimant and his underling made no effort to hide or conceal what they were doing, which supports the claimant's contention they were engaging in acceptable behavior. The employer's policy does not specifically instruct employees that they may not take any abandoned property for their own use. The employer's evidence does not establish that the claimant knew, or should have known that taking abandoned property was an "inappropriate removal" of items from a resident's unit.

Under these circumstances the employer has not met their burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the

employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The February 14, 2019, (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs