

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MARC A RATH
Claimant

APPEAL 16A-UI-11735-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALLIEDBARTON SECURITY SERVICES LLC
Employer

**OC: 10/02/16
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

AlliedBarton Security Services, LLC (employer) filed an appeal from the October 18, 2016 (reference 01) unemployment insurance decision that allowed benefits based upon the determination it failed to provide sufficient evidence to show it discharged Marc A. Rath (claimant) for misconduct. The parties were properly notified about the hearing. A telephone hearing was held on November 14, 2016. The claimant, former Investigator Cody Brown, and former John Deere Security Supervisor Dave Betz participated on claimant's behalf. The employer participated through Account Manager Ronald Tardiff. Employer's Exhibit 1 was received. Official notice was taken of the administrative record, including the fact-finding documents.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits?

Can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Lead Investigator beginning on October 22, 2012, and was separated from employment on October 3, 2016, when he was discharged. The claimant worked for the employer, but was assigned to work at John Deere. He reported directly to and assisted the John Deere Security Manager throughout his employment.

The claimant worked with Investigator Cody Brown until Brown's involuntary separation and reported to John Deere Security Manager Dave Betz until Betz's voluntary separation in

May 2016. Betz authorized the claimant and Brown to release security video footage to John Deere management who were investigating instances of supplier, contractor, or vendor misconduct. Betz was responsible for investigating security issues at the management level.

After Betz left, Duane Lanning was hired into the John Deere Security Manager position. During an investigation at another site, Lanning told the claimant and Brown not to release certain information for that investigation to John Deere management. That was the only time he told the claimant not to release information.

On September 27, 2016, a manager at John Deere requested video footage regarding a supplier bringing in sandwiches for the employees, which is a violation of John Deere's policies. The claimant released the information to the manager as he had in the past. Lanning learned the footage had been given to the manager, who was under investigation for something else. Lanning reported to the employer that the claimant had released confidential information and violated an order had given to have all video releases cleared through him. The employer discharged the claimant based on the information provided by Lanning.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,880.00, since filing a claim with an effective date of October 2, 2016, for the six weeks ending November 12, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa regulations define misconduct:

“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.

Iowa Admin. Code r. 871-24.32(1)a. 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).

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, it incurs potential liability for unemployment insurance benefits related to that separation. 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 the 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).

What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

The employer contends the claimant violated a directive by a supervisor and released confidential, sensitive information. The claimant and Brown denied the supervisor gave the order the claimant allegedly violated. When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The decision in this case rests, at least in part, upon the credibility of the witnesses and whether Lanning forbid the release of any video footage. The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made. Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

The employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. The claimant was doing his job as he had previously been instructed. Lanning did not give an order indicating the claimant could no longer release any video footage without consent. 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. Accordingly, benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The October 18, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The issues of overpayment, repayment, and the chargeability of the employer's account are moot.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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