IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOSEPH D VOGT
Claimant

BLAZIN WINGS INC
Employer

APPEAL NO. 10A-UI-08976-HT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/30/10
Claimant: Appellant (2)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Joseph Vogt, filed an appeal from a decision dated June 24, 2010, reference 01. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on August 10, 2010. The claimant participated on his own behalf. The employer, Blazin Wings, participated by Regional Manager. Mark Sanborn and was represented by ADP in the person of Gregory Anello.

The claimant elected to use a cell phone and was advised it was not recommended. He was notified if the connection was lost during the hearing the administrative law judge would not call back him until he contacted the Appeals Section to indicate the cell phone was working again or to provide the number of another phone, but the hearing would proceed without his participation and might very well be over by the time he called back.

The connection was lost at some point prior to 3:34 p.m. It was discovered by the administrative law judge when the claimant was asked if he wished to do cross examination of the employer's witness and he was not on the line. By the time the record was closed at 3:35 p.m. claimant had not contacted the Appeals Section to rejoin the hearing.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Joseph Vogt was employed by Blazin' Wings from September 24, 2007 until May 28, 2010 as a full-time general manager of the Mason City, Iowa, store.

In January 2008 he was verbally counseled about a money-handling problem. He was taking the deposits from the store to the bank and did not notice one of them dropped out of his hand in the parking lot. The bank verified there was one less deposit than there should have been. Mr. Vogt returned to the store and found the missing deposit.

On January 19, 2010, one deposit was again missing. The claimant did not do the required paperwork on the deposit when he returned to the store or he would have realized he was one deposit short. Instead the bank notified the corporate office on January 22, 2010, and the claimant was notified on January 22, 2010, when he was off work. He found the deposit in his car, took $2,000.00 in cash and put it in his checking account and wrote a check to the store, which he placed in the deposit bag. He said he did this because he was nervous about having so much cash in his car or house. He was issued a final written warning for the incident.

After that incident the employer hired an armored car company to come to the restaurant to pick up the deposits. When the car arrived on Tuesday, May 11, 2010, another deposit was missing. That deposit was from the second shift on Saturday, May 8, 2010. Assistant Manager Tyler Poulter had closed the restaurant that day and was present when the armored car personnel discovered the missing deposit. Mr. Poulter notified Regional Manager Mark Sanders of the situation,

The employer notified the local police department and suspended Mr. Vogt on May 14, 2010. The missing deposit was not found. The corporate human resources and legal departments consulted about the situation and made the decision to discharge the claimant for cash handling violations.

REASONING AND CONCLUSIONS OF LAW:

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.

The employer has the burden of proof to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). There is no doubt the clamant did show poor cash handling skills on at least two prior occasions. But there must be a current, final act of misconduct which precipitates the discharge before disqualification may be imposed under 871 IAC 24.32(8).

In the present case the employer established Mr. Vogt was not working the night of May 8, 2010, when the missing deposit was to have been made at closing. It could not establish whether Mr. Poulter, in fact, made the deposit in the safe at closing. It could not verify whether Mr. Vogt took the missing deposit before pickup occurred on May 11, 2010. Without more definite proof of wrongdoing on the part of the claimant, the employer has not established its burden of proof to show a current, final act of misconduct sufficient to warrant a denial of unemployment benefits.

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. IDJS*, 364 N.W.2d 262(Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment benefits are two separate decisions. *Pierce v. IDJS*, 426 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. IDJS*, 351 N.W.2d 806 (Iowa App. 1984).

Disqualification may not be imposed.

DECISION:

The representative's decision of June 24, 2010, reference 01, is reversed. Joseph Vogt is qualified for benefits, provided he is otherwise eligible.

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Bonny G. Hendricksmeyer
Administrative Law Judge

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Decision Dated and Mailed

bgh/css