

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

STEVEN GRUTZMACHER
Claimant

G M R I INC
Employer

APPEAL 15A-UI-13612-CL-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/15/15
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:

The employer filed an appeal from the December 7, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon misconduct. The parties were properly notified about the hearing. A telephone hearing was held on December 28, 2015. Claimant participated. Employer participated through general manager, Andrew Mialkowski and was represented by Michelle Hawkins. Employer's Exhibit 1 was received.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, 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: Claimant was employed full time as a busser from March 24, 2014, and was separated from employment on November 18, 2015, when he was terminated.

In the weeks preceding his termination, employees named Brady and Taylor had been taunting claimant by calling him "old man." Claimant is 62 years old.

On Saturday, November 14, 2015, claimant asked Brady to help him with scraping food. Brady called claimant "old man" and a pedophile and physically threatened him. Claimant went home early that night because he was sick. Claimant did not report Brady's conduct on November 14 because the restaurant was so busy and no managers were available to speak with him.

On Sunday, November 15, 2015, claimant asked two servers to move so he could put a tray down. Brady said, "Oh, you're Mr. Important now." Brady got about two inches away from claimant's face and physically threatened him. Claimant called back-of-the-house manager Brad over and told him he needed to "control his guy." Brady yelled, "No one needs to control me, old man!" Meanwhile, an employee reported to another manager that claimant and Brady had a verbal dispute and claimant threatened Brady. Two managers took claimant into the office. Claimant said he never had any problems with Brady until Taylor started working there about a week or two ago. Employer suspended claimant pending further investigation.

Employer took witness statements from four individuals. Only Brady's girlfriend reported that claimant physically threatened Brady. Claimant denied physically threatening Brady. Brady did not state that claimant physically threatened him in his witness statement.

Claimant had previously been warned about being rude to a co-worker in June 2015.

Employer concluded claimant physically threatened Brady and terminated his employment on November 18, 2015.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged 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.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). 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).

Employer terminated claimant for allegedly threatening another employee, Brady. Employer presented a witness with only second-hand information. Claimant had first-hand information regarding the incident and denies engaging in the conduct. Because claimant is a first-hand witness to the incident, I find his testimony more credible than employer's. Employer presented four witness statements upon which it made the decision to terminate claimant. However, only one of the witness statements alleges claimant threatened the other employee. That witness is Brady's girlfriend. Brady's witness statement did not allege claimant threatened him. Although employer asserts Brady later amended the back of his witness statement to state he had been threatened, employer failed to provide that amendment. Employer failed to establish claimant threatened Brady and thus failed to establish claimant was terminated for misconduct.

Because claimant is not disqualified from receiving benefits, the issues regarding overpayment are moot and will not be discussed.

DECISION:

The December 7, 2015, (reference 01) unemployment insurance decision is affirmed. Claimant was separated for no disqualifying reason. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Christine A. Louis
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515)478-3528

Decision Dated and Mailed

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