

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KENNETH J LITTLE
Claimant

ANDERSON-ERICKSON DAIRY CO
Employer

APPEAL 19A-UI-06149-CL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/30/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

On August 5, 2019, the claimant filed an appeal from the July 26, 2019, (reference 01) unemployment insurance decision that denied benefits based on a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on November 1, 2019. Claimant participated personally and was represented by attorney John Pieters, Sr. Employer participated through human resource manager Sherry Miller and fleet maintenance manager Adam Phillips and was represented by attorney Melissa Schilling. Tom Evans observed. Claimant's Exhibits 1 through 5 were admitted into the record. Employer's Exhibits A through U were admitted into the record.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer in October 2006. Claimant last worked as a full-time garage mechanic. Claimant was separated from employment on June 27, 2019, when he was terminated.

Employer has work rules that are posted in the workplace. The rules state that breaks are limited to 20 minutes and lunch breaks are limited to 30 minutes. Claimant was entitled to two 20 minute breaks and one 30-minute lunch break each day. Claimant was not required to clock out for breaks and was not required to take the breaks at certain times. Claimant was aware of the rules on breaks.

Employer also has a policy stating that falsification of a time card is a serious violation that will result in termination. Claimant either knew or should have known of the policy.

Claimant was assigned to work at a garage in Waterloo, Iowa, from 9:00 a.m. until 5:00 p.m. on weekdays. Claimant was also assigned to make service calls during business hours and was "on call" to make service calls outside of business hours.

Employer required claimant to punch in and out using a timecard. However, if claimant was not at the facility at the beginning or end of his work day due to a service call, he was allowed to write in his start or end time with a supervisor's approval.

Employer paid claimant for four hours of work beyond his regular pay each pay period for being on call, regardless of whether he actually did any on-call work. Employer's corporate office understood that if claimant performed any on-call work in a given week, he would only get paid above the four hours if his on-call work exceeded four hours. Claimant's understanding was that employer paid him for four hours of work each pay period for being on call, and additionally paid him for four hours of work on each occasion he was called to perform on-call work. Claimant had been paid this way in the past with his supervisor's approval. The specific terms of claimant's on-call pay were never put in writing by either party, although claimant requested that they be on several occasions.

During regular work hours, employer paid claimant to drive from the location of a service call back to the Waterloo garage. Claimant understood that if he instead drove home from the service call location (at the end of the day, for instance), he would be paid for his drive time. Employer had paid claimant that way in the past with a supervisor's approval. According to employer's corporate office, claimant should not have been paid for commuting home from a service call location at the end of the work day. But again, the terms of claimant's pay were not clearly stated in writing prior to the end of his employment.

Employer gave claimant a truck to use for business purposes. In approximately 2010, employer took claimant's company truck away from him because he was seen at a store during the work day with the company truck.

Claimant then worked in various roles for employer before coming back to the Waterloo garage as a mechanic in 2016. From 2016 going forward, claimant was allowed to drive a company truck while working at the facility, but was not allowed to use the company truck to commute home or do personal errands.

Kevin Weber was one of claimant's supervisors during his employment. Weber was located in Des Moines, Iowa. Weber had many discussions with claimant about not using the company vehicle for personal use, including personal shopping errands. However, on other occasions Weber let claimant use the truck to service his and claimant's recreational boats on company time.

On September 24, 2018, employer issued claimant a written letter. It was signed by sales supervisor Eric Widner. The letter notes that on September 19, 2018, claimant exceeded the time of his allowed breaks, left company property for personal business without clocking out, and worked on his personal vehicle during work time. The letter warned that going forward, any unauthorized or extended break, leaving the facility for personal business without clocking out, or any work on a personal vehicle during work time would be considered a violation of work rules and could lead to discipline up to and including termination.

At some point, Widner approved claimant getting a water cooler for the Waterloo, Iowa garage. When Kevin Weber, in Des Moines, got the bill, he came into the shop and said the employer was not paying for water at the Waterloo garage. Claimant continued to purchase water for the garage himself. On some occasions, Widner allowed claimant to leave work to purchase the water when he was already out running company errands.

In February 2019, Mark Walk took over for Eric Widner as sales supervisor. At that time claimant also reported to fleet maintenance manager Adam Phillips, who was located in Des Moines, Iowa. Adam Phillips had told claimant on numerous occasions that he should purchase parts from vendors that would deliver to the store directly and not drive to parts stores himself to purchase and return parts.

On June 17, 2019, a driver sent a text message to claimant at 6:44 a.m. stating he had a leak on his truck. Claimant called the driver at 7:00 a.m. The driver said he thought he could make it to Fairbank, Iowa, so claimant could take a look at it. Claimant resides in Fairbank, Iowa. Claimant met the driver at the Casey's in Fairbank, Iowa, at approximately 8:00 a.m. After looking at the truck, claimant then drove into work and punched in around 8:40 a.m. On his time card, claimant crossed out the time punch of approximately 8:40 a.m. and handwrote 6:44 a.m. Claimant wrote on his time card "Mark O.K.D" Mark Walk never approved the change in the start time and was not aware of it. Claimant tried to contact Walk to get his approval, but never did prior to submitting his time card to payroll.

On June 18, 2019, claimant spent at least eight minutes on his personal phone making a personal call in the morning. Later in the day, claimant was called to work on a piece of equipment in New Hampton, Iowa. Claimant asked Phillips if he could go to New Hampton with his personal vehicle, work on the piece of equipment, take his break and lunch of a combined 50 minutes, and go home from there. Phillips approved that arrangement, but did not approve a specific end time for claimant to write on his time card. Claimant finished the job at 3:20 p.m. Claimant had 50 minutes of break remaining. Claimant drove 50 minutes from New Hampton to his home in Fairbank, Iowa. Claimant marked 5:00 p.m. in handwriting as his end time on his time card and wrote that Phillips approved it.

On Friday, June 21, 2019, claimant worked. Claimant left the premises in the company truck, which is outfitted with a GPS device, and drove to Mutual Wheel. Mutual Wheel is a parts store. Claimant spent about 10 minutes at Mutual Wheel and did not purchase or return any parts. Claimant then drove to Thompson International and returned a part that employer had purchased earlier in the month and did not use. From Thompson International, claimant drove to Randall's Stop and Shop, which is located in Hudson, Iowa. There is a Hy-Vee and other stores that sell water that are located closer to the Waterloo garage. Claimant purchased water for the shop and other personal grocery items, including pork that he did not eat for lunch that day, at the Stop and Shop. Claimant spent 20 minutes inside the Stop and Shop. Claimant drove back to the Waterloo garage which was a 20-minute drive. The whole trip took approximately 2 hour and 30 minutes to complete. Later that afternoon, claimant took 15 minutes to wash his personal vehicle at employer's facility using employer's equipment.

On Monday, June 24, 2019, the payroll department processed claimant's time card. The payroll department contacted Adam Phillips to ask why claimant did not use the time clock to punch out on Tuesday, June 18, 2019, and instead wrote in the end time noting Phillips' approval. Phillips explained to the payroll department what claimant was doing that day. Phillips also contacted Walk about the time card as his approval was also noted on the June 17, 2019, entry. Walk had not approved the entry. Walk emailed human resource manager Sherry Miller, who opened an investigation regarding claimant's time card.

As a part of that investigation, Miller interviewed claimant.

During the interview, claimant stated he arrived at Casey's at 6:44 a.m. on June 17, 2019, to assist the driver in question. Claimant stated that he did not take any breaks during the morning of June 18, 2019, and did not make any calls from his personal phone that morning. In regard

to the June 21, 2019, excursion, claimant stated he only purchased water at Randall's Stop and Shop. Miller asked claimant for the receipt. Claimant stated he could not find it. When Miller confronted claimant about video surveillance of the garage showing him taking grocery sacks and putting them in the cooler after returning from the trip, claimant went to his desk and retrieved the receipt which showed he purchased personal groceries. Claimant also stated during the interview that he washed the company truck on June 21, 2019, when in fact claimant washed his personal vehicle that day.

Employer concluded that claimant violated several company rules and was dishonest during the interview. Employer terminated claimant's employment on June 27, 2019.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code § 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 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.

The employer has the burden to prove the claimant was discharged for job-related misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer made the correct decision in ending claimant's employment, 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). Misconduct justifying termination of an employee and misconduct warranting denial of unemployment insurance benefits are two different things. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

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 is not 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).

In this case, claimant worked independently at a garage in Waterloo, Iowa, beneath various supervisors with whom he seemed to have little personal contact. Many of the terms of employment under which claimant worked were not in writing and his supervisors changed frequently. Claimant's supervisors were willing to violate corporate policy when it served their own purposes. Claimant was aware of all of this, and used it to his advantage.

In regard to the time card issues on June 17 and 18, employer's corporate office had an understanding of how claimant's time should be accounted for, never put it down in clear written terms, and claimant's supervisors did not enforce it that way. The waters are pretty muddy as to whether claimant committed any misconduct with the way he recorded his time on those dates. However, it is clear claimant did not have Mark Walk's approval for his time on June 17 and he should not have stated that he did.

In regard to June 21, employer did establish claimant used company resources for his own benefit and exceeded his break time when he knew he should not have. But there again, claimant's testimony that his supervisors previously allowed him to use the company truck for his purposes and theirs on company time went unrefuted.

What tips this case over the edge is the fact that claimant was intentionally dishonest during his interview with Miller. Claimant denies being dishonest during the interview, but I find Miller to be a more credible witness than claimant. Miller's testimony was consistent and she has no motive to lie, whereas all other witnesses involved in the case have an interest in protecting their own jobs.

Any reasonable employee knows that dishonesty during an employer's investigation of their own misconduct will likely result in termination. Claimant's actions during the interview were taken with deliberate disregard of employer's interests. Furthermore, claimant's dishonesty during the interview shows that he knew the things he was doing were not going to fly with the corporate office, even if his supervisors had been letting him get away with it. The fact that claimant's supervisors, at times, consented to the behavior does not necessarily mean it is reasonable to believe the employer also consented to the approval. *Crane v. Iowa Dept. of Job Service*, 412 N.W.2d 194 (Iowa App. 1987).

Viewing all of the evidence as a whole, employer established claimant was terminated for misconduct.

DECISION:

The July 26, 2019, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Christine A. Louis
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Decision Dated and Mailed

cal/scn