

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANDREW N TRUE
Claimant

APPEAL NO. 15A-UI-09113-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERICAN CUSTOMER CARE INC
Employer

OC: 07/19/15
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Andrew True (claimant) appealed a representative's August 5, 2015, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with American Customer Care (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 1, 2015. The claimant participated personally. The employer participated by Sue Bellefleur, Human Resources Assistant.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on September 29, 2014, as a full-time customer service representative. He worked from 8:30 p.m. to 6:30 a.m. and was allowed three ten-minute breaks and one 30-minute break. The claimant signed for receipt of the employer's policies on September 29, 2014. On March 9, 2015, the employer issued the claimant a verbal warning for performance issues. On April 24, 2015, the employer issued the claimant a written warning for failure to appear for work and notify the employer of his absence. On May 29, 2015, the employer issued the claimant another written warning for performance issues. The employer notified the claimant each time that further infractions could result in termination from employment.

The employer upgraded and installed new servers and monitors on or about May 27, 2015. On May 29, 2015, the workplace was having technical issues. Calls were not coming through to the claimant's work area. Emails were not working properly. The claimant and a co-worker were working alone without any supervisor. The computer status messages were randomly changing without input from the claimant. They took several steps to try to trouble shoot. They contacted IT and supervisors. The claimant called the operations manager three or four times. Sometime between 11:00 p.m. and 12:00 a.m. the claimant and the co-worker decided to take a break together because no work could be performed, no help was coming, and they did not know how

to fix the problem. The claimant set his computer status to "technical support". They took a ten-minute smoking break in the claimant's car. This was the claimant's first break of his shift. During the ten-minute break, the operations manager drove into the parking lot and sent the two home.

The following day the employer told the claimant he was told not to return to work. The client had an issue with the claimant's response time and abandoned calls. In addition, the claimant's computer status from 12:00 a.m. to 4:00 a.m. did not show "technical support." The employer planned to investigate. On June 2, 2015, the employer terminated the claimant and the co-worker.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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 of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. Huntoon v. Iowa Department of Job Services, 275 N.W.2d 445 (Iowa 1979). 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). The employer discharged the claimant for poor work performance and has the burden of proof to show evidence of intent. The employer did not provide any evidence of intent at the hearing. The claimant's poor work performance on May 29, 2015, was a result of the employer's equipment. The operations manager sent the claimant home before she knew the facts of the situation. The employer investigated without listening to the claimant's information. The client was unhappy with the employer and the employer terminated the claimant and the co-worker. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's August 5, 2015, decision (reference 01) is reversed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs