

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**KEVIN E MCPHERSON**  
Claimant

**PROFESSIONAL PROPERTY MGT INC**  
Employer

**APPEAL 16A-UI-06346-SC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/08/16  
Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Kevin E. McPherson (claimant) filed an appeal from the May 9, 2016 (reference 01) unemployment insurance decision that denied benefits based upon the determination Professional Property Management, Inc. (employer) discharged him for engaging in conduct that was not in its best interest. The parties were properly notified about the hearing. A telephone hearing began on June 22, 2016 and was continued to June 27, 2016 at the agreement of the parties. The claimant participated personally. The employer participated through Manager Jennifer Sampson, Vice President Cindy Jorgenson, and Regional Manager Lisa Van Houten. Claimant's Exhibit A was received. Employer's Exhibits One and Two were received.

**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: The claimant was employed full time as a Maintenance Technician beginning on April 14, 2003 and was separated from employment on May 5, 2016, when he was discharged. The claimant reported to Manager Jennifer Sampson and had a newer co-worker named Mike Klein who was assigned to a nearby rental property. The claimant's job duties required him to repair apartments and the buildings, maintain the property, and at times provide training and assistance to Klein. At the end of his employment, the claimant had work restrictions which occasionally required Klein's assistance. The two would also work together when there was a two-person job that needed performed such as lifting heavy equipment.

In November 2015, Vice President Cindy Jorgenson and Sampson met with the claimant and Klein to counsel them on the time they spent working together. They had spent too much time working together on one-person projects. They were not told at that time that their jobs were in jeopardy.

In January 2016, Sampson started having the claimant and Klein track their work time in 15-minute increments. These time trackers were different from their timesheets but were used in case the property owner wanted to see what the employer's staff was doing with their time. The claimant and Klein submitted their first time trackers which Sampson returned as they were

too vague. After that first time, their submissions were adequate. The claimant would not fill out his time tracker as he went through his day; instead, he would fill it out at the end of the day or the following day.

On April 13, 2016, Klein tendered his resignation to Sampson. During the conversation, he brought up some complaints he had regarding how the office staff assigned work orders for himself and the claimant. Sampson began reviewing footage from the surveillance cameras that had been installed on the property in 2015, to determine when work orders were given to Klein and the claimant. She noticed discrepancies between the claimant's time tracker and what he was actually doing. She documented multiple instances of him being in the shop instead of where he said he was working, smoking, at Kum & Go, or working with Klein. She reported these issues to Jorgenson and the decision was made to end the claimant's employment. The employer notified the claimant of his discharge on May 5, 2016. The claimant was surprised as he did not know his job was in jeopardy.

### **REASONING AND CONCLUSIONS OF LAW:**

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

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).

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's argument that the claimant was stealing time is not persuasive. The claimant was present at the job site while he was clocked in. The employer has established that it did not like the way he was spending his time and felt he was being dishonest. However, the employer did not give the claimant any disciplinary warnings about the way he was filling out his time tracker, using work time, or taking his breaks. As the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. 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. Training or general notice to staff about a policy is not considered a disciplinary warning. Accordingly, benefits are allowed.

#### **DECISION:**

The May 9, 2016 (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Stephanie R. Callahan  
Administrative Law Judge

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Decision Dated and Mailed

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