

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

EARL R THOMAS
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 18A-UI-09565-DB-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/12/18
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/appellant filed an appeal from the September 6, 2018 (reference 04) unemployment insurance decision that allowed benefits to the claimant based upon his separation from employment. The parties were properly notified of the hearing. A telephone hearing was held on October 3, 2018. The claimant, Earl R. Thomas, participated personally. The employer, Swift Pork Company, participated through witness Vicky Cervantes. Employer's Exhibits 1 and 2 were admitted. The administrative law judge took official notice of the claimant's unemployment insurance benefits records.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any 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 general laborer from December 11, 2017 until August 9, 2018, when he was discharged. Rudy Matta was claimant's immediate supervisor.

On Friday, August 3, 2018, claimant became ill and went to the emergency room after work. His doctor told him to refrain from working for two workdays and gave him paperwork to that effect. Claimant was scheduled to work next on Monday, August 6, 2018.

On Saturday, August 4, 2018, claimant went to the employer's premises to provide the Human Resources Department with paperwork regarding him being gone from work on Monday, August 6, 2018 and Tuesday, August 7, 2018, so that he did not incur any attendance points under the employer's attendance policy. At approximately 7:00 a.m., he entered the facility and asked a security guard whether they knew if anyone in the Human Resources Department was available. In order to speak to the security guard, claimant walked through a small metal gate

that divided the entry and exit walkways into and out of the facility. He walked to the Human Resources Department and no one was in the office. Claimant then exited the facility without delivering the doctor's note. At approximately 1:00 p.m., claimant again entered the facility in order to turn in his doctor's note regarding his illness to the Human Resources Department. There was no one in the Human Resources Department when he came back to the facility a second time.

Claimant's supervisor told Ms. Cervantes that claimant had clocked in and out of the time clock on August 4, 2018, but had not been working that day. Ms. Cervantes testified that the employer had recorded a video of claimant clocking into the time clock himself on August 4, 2018, but it was not offered into evidence during the hearing or presented to the claimant during the discharge meeting. Claimant testified that he did not punch in to the time clock on August 4, 2018 because he was not scheduled to work and did not work. No documentation from the time clock was offered into evidence by the employer. Mr. Matta did not testify as a witness at the hearing regarding his review of the time clock records.

The employer does have a written policy against falsification of time clock records. Claimant was aware that falsification of records could result in discharge from employment. Claimant was not going to be discharged due to any absenteeism violations and only had one previous written warning prior to discharge.

Claimant received benefits in the amount of \$2,919.00 for the seven weeks between August 12, 2018 and September 29, 2018. Employer did participate in the fact finding interview.

REASONING AND CONCLUSIONS OF LAW:

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

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Further, 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 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 decision in this case rests upon the credibility of the parties. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

Ms. Cervantes testified that claimant clocked into the time clock himself on August 4, 2018. Claimant testified that he did not clock into the time clock on August 4, 2018. Ms. Cervantes testified that the employer had a video recording of claimant clocking into the time clock himself on August 4, 2018, but it was not offered into evidence during the hearing. Further,

Ms. Cervantes relied on the statements Mr. Matta that the claimant was required to work on August 4, 2018. The employer failed to offer the testimony of Mr. Matta regarding his review of claimant's time card for August 4, 2018 and whether claimant was even scheduled to work on that date in the first place. As such, the administrative law judge concludes that the claimant's first-hand testimony is more credible than Ms. Cervantes' testimony, which relies on hearsay statements from Mr. Matta.

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *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). Further, 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).

There was no credible evidence presented that claimant falsified his time card on August 4, 2018. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). The employer failed to meet its burden of proof in establishing disqualifying job-related misconduct. As such, benefits are allowed. Because benefits are allowed, the claimant is not overpaid benefits. The employer's account may be charged for benefits paid.

DECISION:

The September 6, 2018 (reference 04) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The employer's account may be charged for benefits paid.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs