

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN L CUSTER

Claimant

APPEAL NO: 16A-UI-11315-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA DEPT OF PUBLIC SAFETY

Employer

OC: 09/18/16

Claimant: Appellant (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the October 10, 2016, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 3, 2016. The claimant participated in the hearing with Witness/DCI Special Agent II Tim Van Engen and was represented by Attorney Katrina Phillip. Brett Braafhart, Special Agent in Charge, participated in the hearing on behalf of the employer. Employer's Exhibits 1 through 10 were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time Special Agent II for Iowa Department of Public Safety from October 31, 1997 to September 17, 2016. He was discharged for failing to follow the employer's residency requirements and misleading his supervisor about his place of residence in addition to falsifying his time and activity reports (TAR).

The claimant was promoted to Special Agent II in February 2016. As a Special Agent II the claimant was required to live within 30 straight line miles from the casino where he was assigned to work. The claimant was living in Merville, Iowa, which was approximately one hour and 45 minutes away from the casino. The claimant provided an address in Sioux Center, Iowa, which was 44 road miles from the casino and told his supervisor he was living in Sioux Center when in fact he still was living in Merville. Special Agent in Charge Troy Nelson drove between the casino and the claimant's stated address in Sioux Center three times and the trip averaged 46 minutes.

On July 8, 2016, the employer provided the claimant with a notice of investigation and on July 14, 2016, the employer held the initial interview with the claimant about the residency issue (Employer's Exhibit 7). The claimant admitted he was not acting within the scope of the

residency policy and was not truthful with his supervisor about where he was residing as he told him in April 2016 he was living in Sioux Center (Employer's Exhibit 7).

Following that interview the employer asked Special Agent in Charge Nelson, the claimant's supervisor, to review the video from the casino to see when the claimant was arriving for and leaving work and his lunch breaks. Special Agent in Charge Nelson gathered the claimant's arrival and departure times, his lunch breaks, time spent at the casino, estimated drive time, and what he showed as time worked on his time and activity report (TAR) (Employer's Exhibit 10). While employees are allowed to count their drive time to and from work as work time the employer assumes and expects they are living within the 30 mile radius. Between July 1 and July 21, 2016, there were nine days when the claimant went to work before doing other tasks, such as having work done on his work vehicle (Employer's Exhibit 10). His average arrival time was 9:27 a.m. indicating he counted his drive time from Merville rather than Sioux Center. He never stayed past 3:46 p.m. on any of those dates (Employer's Exhibit 10). He indicated he worked eight hours each day between July 1 and July 21, 2016, with the exception of July 19, 2016, when he took one-half day of vacation (Employer's Exhibit 10). The claimant stated Special Agent in Charge Nelson told him and other employees to always indicate they worked eight hours per day even if they did not. Special Agent in Charge Nelson submitted a statement clarifying that when he took over as supervisor in December 2013 he told the SA2's he "would like to see them working a typical 8 hour work day, Monday through Friday, not only day time but also some night time...an occasional weekend even if it's just for a few hours" (Employer's Exhibit 9). Special Agent in Charge Nelson stated he realized there would be times they did not work a typical eight hour day, due to travel, training, or when they had a big case, were on assignment, or when their children had an event they wanted to leave early for, but he told them to "report their hours as they worked them" (Employer's Exhibit 9). After it became known that the claimant was stating Special Agent in Charge Nelson told all agents to write down eight hours worked whether they actually worked eight hours or not, four agents approached Special Agent in Charge Nelson and stated they had never heard him give that instruction (Employer's Exhibit 9).

The employer conducted a second interview with the claimant August 4, 2016 (Employer's Exhibit 8). The employer raised the issue of the claimant's truthfulness with his supervisor and the claimant acknowledged he may have misled his supervisor about his living arrangements as he had never lived in Sioux Center. The claimant did not tell Special Agent in Charge Nelson he was having problems finding housing or ask for an exception to the rule until he was able to find a place to reside.

The claimant had 90 days to establish a residence within the 30 mile radius but stated he could not find anything he could afford due to the summer construction season and the pipeline construction. He did find a place in Sioux Center the day after the first interview with the employer July 14, 2016. The claimant has a high school age child at home and he did not want to uproot her and move his family to Sioux Center.

The claimant signed the ethics policy October 21, 2007; he signed the residency policy March 17, 2014; and he signed the code of conduct policy June 14, 2016.

After reviewing the situation and compiling the report (Employer's Exhibit 10) the employer concluded the claimant violated the ethics, residency, and code of conduct policies and terminated his employment September 17, 2016.

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:

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 proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

The claimant violated the employer's residency requirement, ethics, and truthfulness of reports policies. He failed to establish residency within 30 straight-line miles of the casino within 90 days of his February 2016 promotion, was dishonest when speaking to his supervisor about where he was living after his promotion, and falsified his time and activity reports on nine of nine days in July 2016 he was expected to report to work without performing another task first and

indicated he worked eight hours every day he was scheduled in July 2016, with the exception of one half-day of vacation.

The claimant testified he could not find housing within 30 straight line miles of the casino. However, after the employer conducted the first interview with the claimant July 14, 2016, he secured housing in Sioux Center the following day. That fact calls into question whether the claimant truly could not find a place to live within the radius or simply did not wish to move from his home in Merville.

As a Special Agent II, the claimant had a heightened duty to be honest with his employer. Instead, he intentionally misled his supervisor about where he was living and reported he worked eight hours every day he was scheduled. The claimant admitted to his conduct when interviewed by the employer and while testifying in the hearing. While he maintains Special Agent in Charge Nelson told him to indicate he worked eight hours every day he was scheduled, that was not the employer's policy and Special Agent in Charge Nelson denies telling the claimant or other employees to record their time in that manner.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

DECISION:

The October 10, 2016, reference 01, 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.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/rvs