

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JASON BURKE
Claimant

BORDER FOODS OF IOWA LLC
Employer

APPEAL 21A-UI-07690-WG-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/10/21
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the March 9, 2021, (reference 01) unemployment insurance decision that denied benefits based upon his discharge from employment for misconduct due to failure to perform satisfactory work. The parties were properly notified of the hearing. A telephone hearing was held on May 12, 2021. The claimant, Jason Burke, participated personally and testified on his own behalf. The employer participated through Brandan Wagner, claimant's immediate supervisor. Employer's Exhibits 1 through 3 were admitted into the evidentiary record without objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as general manager, running a Taco Bell restaurant for the employer. Claimant was hired on August 9, 2017 and last worked for the employer on December 15, 2020. Mr. Burke worked a varying schedule based upon his managerial duties and the restaurant needs. Claimant's job duties included running an efficient restaurant, managing staffing issues, maintaining and controlling inventory, maintaining appropriate speed of service as well as maintaining the anticipated corporate culture and environment. Brandan Wagner was claimant's immediate supervisor.

In April 2020, claimant transferred to a new restaurant with instructions to assist the existing general manager change the culture and performance of the general manager then assigned to the Taco Bell. Ultimately, the prior general manager was unable to meet the corporate expectations of the employer and was discharged. After assuming management of the Taco Bell as the general manager in the summer of 2020, claimant was unable to meet many of the corporate standards for inventory control, training of new employees, and creating a positive corporate atmosphere at the restaurant. The employer introduced exhibits and offered

testimony as to the shortcomings it perceived in claimant's performance and output measurements.

The employer put Mr. Burke on a performance improvement plan and outlined several changes claimant need to make or face further discipline, including discharge. Claimant's supervisor had follow-up dates on the performance improvement plan twice in October 2020, once in November 2020, and on December 3, 2020. Ultimately, the company determined that Mr. Burke was not meeting its corporate standards for a general manager. On December 15, 2020, the employer discharged Mr. Burke.

Brandan Wagner testified that he believed claimant was not giving his best performance and was intentionally underperforming in his role as a general manager. Mr. Wagner testified he had worked side-by-side claimant in the past and knew his abilities. He testified that claimant was not giving or doing his best work as a general manager. He testified that he believed Mr. Wagner was blatantly not using the tools made available to him by the employer and intentionally underperforming.

Mr. Burke testified that he was giving his best effort every day. He testified to his efforts and long work hours trying to meet the corporate standards established by the employer. He testified he acknowledges some of his shortcomings when the performance improvement plan was implemented and that he increased his efforts. He implemented regular managerial meetings as requested by the company. Shift huddles of employees occurred more frequently after the performance improvement plan was instituted. He testified that many of the employees improved in performance with the use of scales to meet corporate standards for food preparation. Claimant testified to his efforts and improvements with staff training. Mr. Burke also testified that he asked for assistance from his supervisor and received only minimal assistance.

Considering testimony of Mr. Burke and Mr. Wagner, I ultimately find the testimony of Mr. Burke about his efforts and improvements after being placed on the performance improvement plan to be credible and convincing. I find that Mr. Burke was giving effort and attempting to meet the corporate standards established by the employer. While he was ultimately not able to meet those corporate standards and was discharged for his inability, I find that his inability was not the result of an intentional effort to subvert the employer's interest. Instead, Mr. Burke was simply unable to achieve the standards established by the employer. While it may have been entirely reasonable and entirely within the employer's rights to discharge Mr. Burke, I find that Mr. Burke's discharge was the result of his inability to perform to the corporate standards established by the employer and not the result of any intentional efforts by Mr. Burke to underperform or damage the employer's interests.

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).

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).

I did not find that claimant's conduct or actions were intentional or were caused by claimant's carelessness which indicated a wrongful intent. Claimant's behavior does not rise to the level of misconduct. 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). I find that claimant's actions did not have any wrongful intent.

Reoccurring acts of negligence by an employee would probably be described by most employers as in disregard of their interests. *Greenwell v Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. March 23, 2016). The misconduct legal standard requires more than reoccurring acts of negligence in disregard of the employer's interests. *Id.*

Further, a claimant's poor work performance does not disqualify her from receiving benefits. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon*, 275 N.W.2d at 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986).

I conclude that the employer failed to meet its burden of proof in establishing disqualifying job misconduct. As such, benefits are allowed.

DECISION:

The March 9, 2021, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.



William H. Grell
Administrative Law Judge

May 20, 2021
Decision Dated and Mailed

whg/kmj