

BEFORE THE  
EMPLOYMENT APPEAL BOARD  
Lucas State Office Building  
Fourth floor  
Des Moines, Iowa 50319

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DWIGHT W JONES

Claimant

and

HEW HOTELS LLC

Employer

HEARING NUMBER: 18BUI-08372

EMPLOYMENT APPEAL BOARD  
DECISION

N O T I C E

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION:** 96.5-2A, 96.5-1

D E C I S I O N

**UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE**

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

The Claimant, Dwight W. Jones, worked for Hew Hotels, LLC from October 11, 2016 through July 18, 2018, most recently as a full-time night auditor with a start time of 3:00 p.m. As night auditor, Mr. Jones is responsible for making sure all customers have paid when he arrives at work at 3:00 p.m. (54:02-54:22) During the course of his employment, he found it necessary on three occasions to contact customers during the late hours to inform them their method of payment was inadequate and sought additional measures to ensure payment the following morning. (57:44-57:59) Failure to obtain payment on any room could result in his financial liability for the room, or worse yet, his termination.

New management took over the hotels on June 1, 2018 (24:43-24:48), and terminated several employees, but retained the Claimant and a few others. (51:40) Having been there the longest (working his way up a janitorial position) (56:56-56:59), the Claimant was trained on all three shifts as well responsible for training other employees. (51:40-51:45) New employees had to be trained on the computers; in order to gain access, they were required to use the Claimant's name. (51:53-52:16; 58:05-58:23) The Claimant sometimes found discrepancies in the hotel cash drawers, which he was

ultimately responsible to account for. (54:09)

When Mr. Jones arrived at work on July 5, 2018, he noted the person on 2<sup>nd</sup> shift failed to take a payment from a customer (whose father was supposed to call in with a credit card number), which had gone unnoticed through two shifts. (54:36-54:59; Exhibit 4) The Claimant contacted the customer's father at his home about 1:08 a.m., leaving a message requesting authorization for payment on his daughter's room. (54:59-55:26) Mr. Jones did not call the actual customer's room until the following morning when a credit card had still not been called in. (55:22-55:36) The next day, the Employer received that same guest's complaint about the Claimant calling late at night requesting payment when he already prepaid. (Exhibit 3)

The Employer contacted the Claimant on July 8th, 2018 to inform him of his prompt suspension pending further investigation. The Claimant was also directed not to return to the premises lest the police would be contacted. (48:28-48:50) The Claimant was deeply upset, as he believed he might be promoted to general manager based on his longevity with the company and his prior additional responsibility of training new employees. (49:38-49:40)

The Claimant lives in a small community and started hearing rumors he was under investigation and being fired for credit card theft. (50:21-51:00; Exhibit D) The Claimant then texted the Employer asking what he was being accused of, and whether or not he could return to work. (Exhibit E) The Claimant received no response from the Employer. (Exhibit E) The investigation was conducted by Ken Dunlavy, Shawna Reed (General Manager) and Amy. (46:55)

In the interim, the Employer uncovered potential credit card fraud issues; illegal guest interactions; and potential drug abuse on the premises. (40:40-41:04; 42:20-42:45) The Employer believed the Claimant had accepted credit card payments for several customers' rooms upon their arrival; later contacting customers in the middle of night indicating the cards didn't go through, and requesting cash payment instead, which was never placed in the hotel's cash drawers. The Employer also received a statement from a former employee about a customer who claimed the Claimant contacted him around midnight inquiring if he wanted to get high, which the Claimant denied. (38:45-38:54; Exhibit 2)

The Claimant had never been warned about any prior infractions. (44:05-44:17; 1:05:04-1:05:25) On July 18, 2018, the Employer terminated the Claimant for failing to report back on the 18<sup>th</sup>, and for theft.

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

Iowa Code Section 96.5(2)(a) (2013) provides:

*Discharge for Misconduct.* If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665, (Iowa 2000) (quoting *Reigelsberger v. Employment Appeal Board*, 500 N.W.2d 64, 66 (Iowa 1993)).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. 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 Board*, 616 NW2d 661 (Iowa 2000).

Employer testified to about six allegations of credit card fraud allegedly perpetrated by the Claimant during his employment most recently as the night auditor. However, the Employer provided only one hearsay written statement (Exhibit 3) to corroborate the Employer's testimony. While hearsay evidence is generally admissible in administrative proceedings and may constitute substantial evidence to uphold a decision of an administrative agency (*Gaskey v. Iowa Dept. of Transportation*, 537 N.W.2d 695 (Iowa 1995)), whether or not hearsay, an agency must have based its findings "upon the kind of evidence on which reasonably prudent persons are accustomed to rely on for the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a jury trial". Iowa Code Section 17A.14(1); see also, *McConnell v. Iowa Dept. of Job Service*, 327 N.W.2d 234 (Iowa 1982). The entire record must be examined to see if it rises to the necessary levels of trustworthy credibility and accuracy to meet the "reasonably prudent person" criteria. *Schmitz v. Iowa Dept. of Human Services*, 461 N.W.2d 603 (Iowa App. 1990) We find it does not. The Employer's statements are unsupported by any corroborating evidence with the exception of that final incident, which we attribute very little weight.

The Claimant admitted he contacted this customer's father on July 5th, but denied contacting customer's daughter in her room at 1:08 a.m. The only reason Mr. Jones made such a call in the first place was in keeping with his job responsibilities as a night auditor to ensure these patrons paid their hotel bill. While we question his judgement in contacting anyone at that late hour, we find he acted in good faith in trying to obtain what appeared to be a repeatedly missing payment. The Employer failed to provide any firsthand witness(s) to corroborate this hearsay evidence to refute the Claimant's testimony, which we find credible.

As for the other alleged credit card fraud incidents, the Employer provided no names, dates or any other specifics to corroborate that these incidents happened. Again, there were no firsthand witnesses, i.e., Ken Dunlavy, Shawna Reed, or customer accounts to testify as to the details that led to the Employer's allegations that Mr. Jones committed credit card fraud several times throughout his employment.

As for the Employer's allegation that the Claimant contacted a customer late night to invite him to 'get high,' the statement (Exhibit 2) provided no author's name, no date, nor any witness to attest to the incident, which Mr. Jones vehemently denied.

871 IAC 24.32(4) provides:

*Report required.* The claimant's statement and 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 the cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The Employer has failed to substantiate allegations raised against the Claimant. Both parties agreed he'd never received any prior warnings for any past infractions. Had the provided firsthand witnesses, this case may have had a different outcome. However, based on the record before us, we conclude the Employer failed to satisfy their burden of proof.

#### **DECISION:**

The administrative law judge's decision dated September 4, 2018 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

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Kim D. Schmett

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Ashley R. Koopmans

#### **DISSENTING OPINION OF JAMES M. STROHMAN:**

I respectfully dissent from the decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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James M. Strohmman

AMG/fnv