

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHARLES HEIST
Claimant

MCCORMICK CONTRACTING
Employer

APPEAL 16A-UI-02873-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 02/07/16
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the March 1, 2016 (reference 04) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 29, 2016. Claimant participated. Employer participated through Joshua Davis, COO. Employer's Exhibit One was entered and received into the record.

ISSUE:

Was the claimant discharged due to job-connected misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a sales person full time beginning on January 1, 2016 through January 28, 2016; when he was discharged. This employer has gone through three corporate identities during the time of the claimant's employment beginning in October 2013. The company was first known as McCormick Insulation, then as Analytics Options, and finally as McCormick Contracting. All three companies carried different employer account numbers. The claimant worked as a sales person for all three companies. Mr. Davis joined the company in March 2015 and became the claimant's direct supervisor.

The claimant was a difficult employee for Mr. Davis to supervise. As the claimant was required to travel frequently for sales appointments, Mr. Davis wanted to have an idea of what the claimant was doing during the work day and where he was. He required the claimant fill out a time sheet that would provide information about where the claimant was during the work day, including what appointments he attended and jobs he sold. The claimant was to provide the information to Mr. Davis on a weekly basis. The claimant would fill out the time sheet for a week or so, and then would stop completing the time sheet or turning anything into Mr. Davis. Mr. Davis never wrote the claimant up or told him that his failure to turn in the required time sheet was jeopardizing his job. After time passed, Mr. Davis would meet with the claimant again and again ask the claimant to fill out the time sheet. For a few weeks after each meeting the claimant would turn in a time sheet but would then fall right back into the same habit of failing to complete the required paperwork. This pattern continued for all of the claimant's employment while Mr. Davis was his supervisor.

The claimant missed an appointment with a potential customer on January 27. There were no other instances where he had missed appointments and he no prior warnings for missing appointments with customers. The claimant had no warning verbal or written that there were changes he needed to make in order to preserve his employment.

During this time period, Mr. Davis heard from others, whom he would not name at the hearing, that the claimant was giving jobs to competitors and was stealing insulation from the employer that he was selling out of his garage or storage shed. Mr. Davis hired a private investigator and installed security cameras in the storage area. He installed new padlocks on the storage containers. No evidence supports the employer contention that the claimant was stealing from them or that he was giving smaller jobs to competitors. No evidence supports the employer's contention that the claimant violated the non-compete agreement. The claimant denies stealing from the employer or violating the employer's non-compete agreement.

REASONING AND CONCLUSIONS OF LAW:

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

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 proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

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, employer incurs potential liability for unemployment insurance benefits related to that separation. The employer allowed the claimant to skip filling out the time sheet over and over again without warning him that he needed to do so to preserve his employment. The employer had not warned the claimant about any missed appointments prior to his discharge. The employer's evidence simply does not establish theft on the part of the claimant or that the claimant violated the non-compete agreement. Under these circumstances, the employer has not met the burden of proof to establish that 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. Benefits are allowed.

DECISION:

The March 1, 2016 (reference 04) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

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