

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JOHN SEBETKA**  
Claimant

**OREILLY AUTOMOTIVE INC**  
Employer

**APPEAL 21A-UI-06723-ML-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 01/17/21**  
**Claimant: Appellant (2)**

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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 1, 2021 (reference 01) unemployment insurance decision that disallowed benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on April 21, 2021. The claimant, John Sebetka, participated personally. The employer, O'Reilly Automotive Inc., participated through witness Jay Lawinger.

**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 part-time as a Delivery Specialist. Claimant was employed from October 27, 2017, until January 15, 2021, when he was discharged from employment. Claimant's job duties included delivering parts to commercial customers, loading and unloading vehicles, stocking inventory, and maintaining vehicles. Christina Mozingo was claimant's immediate supervisor.

The employer has a written disciplinary policy that requires all team members to report any misdemeanor or felony charges received to the employer within 7 days of arrest. Ideally, the employer would like for its employees to submit a copy of the police report when applicable. Failure to follow said policy can lead to disciplinary action, up to and including discharge. Claimant signed an acknowledgement of the policy on October 27, 2017.

At various times throughout the year, the employer conducts random background checks as a means of enforcing the aforementioned disciplinary policy.

On or about August 10, 2020, claimant was charged with a simple misdemeanor. Claimant did not miss any work as a result of the simple misdemeanor. Claimant did not report the simple misdemeanor to his direct supervisor, Ms. Mozingo; however, claimant testified that he mailed a

copy of the police report to O'Reilly's corporate office shortly thereafter. There is no record of O'Reilly's corporate office ever receiving the police report in the mail. Claimant testified it is possible the police report did not make it to O'Reilly's corporate office due to the derecho that passed through Iowa on August 10, 2020. Claimant did not follow-up with the employer after mailing the police report. He continued working for the employer until January 15, 2021.

On January 15, 2021, claimant received a telephone call from Ms. Mozingo, notifying him that the employer had conducted a random background check and discovered the August 10, 2020, simple misdemeanor. The employer concluded claimant failed to report the simple misdemeanor within 7 days of arrest and discharged claimant for violating its rules of conduct. Claimant testified his failure to report the simple misdemeanor was the only reason provided as grounds for his termination. Claimant further testified Ms. Mozingo told him the employer would consider bringing him back on staff if the simple misdemeanor was expunged from his record. Ms. Mozingo did not testify at the April 21, 2021, hearing.

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

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

As a preliminary matter, the administrative law judge finds that Claimant did not quit. Claimant was discharged from employment.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) 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 cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(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.

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). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* 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). 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).

A claimant can be disqualified for benefits when their off duty conduct is a violation of a specific work rule. *Kleidosty v. Emp't Appeal Bd.*, 482 N.W.2d 416 (Iowa 1992). The misconduct must be 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. 871 Iowa Admin. Code r. 24.32(1).

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be “work-connected.” *Diggs v. Emp’t Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). The court has concluded that some off-duty conduct can have the requisite element of work connection. *Kleidosty v. Emp’t Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, for an employer to show that the employee’s off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence that the employee’s conduct (1) had some nexus with the work; (2) resulted in some harm to the employer’s interest, and (3) was conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer’s interest would suffer. See also, *Dray v. Director*, 930 S.W.2d 390 (Ark. Ct. App. 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), quoting *Nelson v. Dept of Emp’t Security*, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§ 77–78.

A determination as to whether an employee’s act is misconduct does not rest solely on the interpretation or application of the employer’s policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. For off-duty conduct to be grounds for disqualification of unemployment benefits the conduct must be work related or the conduct must have direct, negative effect on the employer.

It is important to note that this decision is not particularly concerned with the conduct that lead to the simple misdemeanor charge; rather, this decision is concerned with whether or not claimant complied with the employer’s rules of conduct with respect to reporting misdemeanors and felonies.

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.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using his own common sense and experience, the Administrative Law Judge finds that Mr. Sebetka is a credible witness. I accept claimant’s testimony that he mailed the copy of his police report to the employer’s corporate office shortly after the simple misdemeanor charges were brought against him.

In this case, the claimant attempted to comply with the employer’s rules of conduct when he mailed the police report in August 2020. Until the January 15, 2021, telephone call with Ms. Mozingo, it appears claimant genuinely believed he had complied with the employer’s rules of conduct.

Moreover, there is no evidence of harm to the employer’s interests or reputation. Although the conduct that resulted in a simple misdemeanor may have raised trustworthiness issues and may have been a reasonable reason to sever the employment relationship, it does not rise to the level of work connectedness with this employer required to disqualify. The record here is devoid

of any evidence demonstrating a deleterious effect on morale or working conditions or any kind of disruption in the work place.

Claimant's actions on or about August 10, 2020, and failure to report the same, have not been shown to be an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer. The employee attempted to comply with the employer's rules of conduct when he mailed a copy of the police report to the employer's corporate office. The employer has failed to meet its burden of proof to establish a disqualifying act of misconduct.

**DECISION:**

The March 1, 2021 (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no qualifying reason. Benefits are allowed, provided claimant is otherwise eligible.



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Michael J. Lunn  
Administrative Law Judge  
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May 21, 2021  
Decision Dated and Mailed

mjl/ol