

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

AGO HUSKIC
Claimant

1ST CLASS SECURITY INC
Employer

APPEAL 17A-UI-05843-NM

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/07/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 30, 2017, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for dishonesty in connection with his work. The parties were properly notified of the hearing. A hearing was held on June 28, 2017 in Des Moines, Iowa. The claimant participated and testified in person. The employer participated via telephone through Vice President David Braunger.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a loss prevention officer from October 28, 2014, until this employment ended on May 10, 2017, when he was discharged.

On May 9, 2017, the employer received information from one of its clients, for whom claimant was working as a loss prevention officer, that they believed he was leaving the store without clocking out. The client forwarded still images from its security cameras for seven dates to support this conclusion. The still images show claimant leaving at 12:30 on May 1 and returning at 2:00, on May 2 claimant is shown leaving at 4:50 and returning at 6:20, on May 3 he is seen leaving at 1:40 and returning at 5:05, on May 6 he is seen leaving at 1:30 and returning at 4:13 then leaving again at 5:00 and returning at 6:35, on May 7 he is seen leaving at 2:25 and returning at 5:09, and on May 8 he is seen leaving at 2:03 and returning at 3:17. This time totals almost 15 hours of time that claimant was being paid to work but could not be accounted for. The employer concluded claimant was engaging in time theft and discharged him from employment.

Claimant testified that during this time there were issues with the security cameras freezing and otherwise not working properly, so he would leave the security office to do lot checks and surveillance from his car in the parking lot. Braunger testified lot checks are part of claimant's

job description, but generally take around 15 minutes to complete, and he was not aware of any reason claimant would be doing surveillance from his car, as one cannot see merchandise being stolen from the store this way. Claimant testified he would only conduct this type of surveillance when there was another employee inside the store. Claimant further explained this was necessary because the store is located near a truck stop and suspicious looking people are often in the parking lot. Claimant confirmed there is no merchandise to be stolen in the parking lot, but that he nevertheless might have spent up to three hours surveilling people in this area for other suspicious activity.

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 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).

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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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).

The claimant has argued he was not stealing time, but was conducting work-related surveillance from his car for long periods of time, sometimes up to three hours. 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 her own common sense and experience, the administrative law judge does not find the claimant's explanation as to how he was spending his time to be credible.

Stealing time, or not working while on the clock, is theft from the employer. Theft from an employer is generally disqualifying misconduct. *Ringland Johnson, Inc. v. Hunecke*, 585 N.W.2d 269, 272 (Iowa 1998). In *Ringland*, the Court found a single attempted theft to be misconduct as a matter of law. In this case, the claimant deliberately disregarded the employer's interest. The claimant engaged in disqualifying misconduct even without previous warning. Benefits are denied.

DECISION:

The May 30, 2017, (reference 01) unemployment insurance 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.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/scn