IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

KELVIN N HOWELL
Claimant

USA STAFFING INC
LABOR WORLD IA
Employer

APPEAL NO. 07A-UI-08884-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/12/07 R: 02
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 13, 2007, reference 03, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on October 3, 2007. Claimant participated. Employer participated through Bruce Moore and Mitch Seitz and was represented by Jeff Oswald of Unemployment Services.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a general day laborer for USA Staffing doing business as Labor World Iowa (USA) and was assigned to Nelson Construction during the day on Monday, August 6 and Tuesday August 7. Claimant presented work assignment tickets totaling 16.5 hours for those days at the end of each day. The parties dispute whether USA sent him but he also reported to Nelson on August 8 and 9 and was asked to work by the site supervisor. Since the main office did not communicate with the site supervisor about the status of authorized day labor, he called USA to give authorization for payment of eight hours on each of those days as had been done in the past. Claimant was paid on August 10. He also reported to USA for any additional work and was assigned to work second shift at Exhibits Display on August 8 through 9 and worked 11.25 hours overnight. Claimant also worked an additional 16 hours at Exhibits Display during that week's pay period. The only ticket not presented within one business day of work was the final shift at Exhibits Display presented for payment on August 13. There is no internal communication at USA that monitors when an employee is approaching overtime hours for the week and the daytime staff at USA did not communicate with the evening staff about worker assignments.

Employer calculated that he worked 58.08 hours between the two assignments and discharged him for holding tickets and working overtime. The actual tally given those figures is 59.75.

Employer initially testified that work tickets were only issued on the day of the assignment to be performed but later acknowledged that it sometimes prints out multiple day tickets on one day and manually changes the date for the next shift date. This happened with the Exhibits Display tickets for the week in question.

On July 2, Kristin Adams spoke to claimant about working overtime and may or may not have explained that overtime was only allowed if the hours worked came from one assignment and not a combination of two or more. In either event claimant did not understand the restriction or rationale. On August 7, Seitz spoke with claimant about holding tickets for payment. Neither put anything in writing for claimant or warned him that his job was in jeopardy.

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.

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.

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).

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. Employer's credibility is questionable because of the backpedaling on the matter of issuing multiple tickets on one day and the initial claim that claimant held all tickets for the week and submitted them on August 13, when only one of the tickets was held until then. This alleged conduct was clearly a case of a reasonable misunderstanding of employer's vague instructions and his submission of the final ticket the first business day after the weekend was not unreasonable. Inasmuch as employer had not previously clearly warned claimant his job was in jeopardy about overtime or submission of tickets, it 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. The claimant was entitled to fair warning that the employer was no longer going to tolerate his performance and conduct. Without fair and clear warning, the claimant had no way of knowing that there were changes he needed to make in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written – in this case verbal discussions were not sufficient to make employer's wishes clear), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The September 13, 2007, reference 03, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css