

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DUSTAN J GAULEY
Claimant

STELLAR INDUSTRIES INC
Employer

APPEAL 16A-UI-07998-DB-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/19/16
Claimant: Appellant (2)

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 July 11, 2016 (reference 01) unemployment insurance decision that denied benefits based upon his discharge from employment for job-related misconduct. The parties were properly notified of the hearing. A telephone hearing was held on August 8, 2016. The claimant, Dustan J. Gauley, participated personally. The employer, Stellar Industries Inc., participated through Manufacturing Manager Rhonda Krause.

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 full time as painter from September 9, 2014 until his employment ended on June 15, 2016. Claimant's job duties included painting truck bodies, parts, and cranes. Bob Joynt was claimant's immediate supervisor.

On June 7, 2016 Ms. Krause was advised by the human resources department at the Garner, Iowa location that there was a winch that was listed for sale by claimant on a website called North Iowa Man Stuff which was the property of the employer. At this point the employer did not know that any winches had been stolen. No employees had reported any missing winches.

Ms. Krause went to the Kanawha, Iowa location where the claimant worked and took inventory of the employer's winches. There were three winches that were found missing. Claimant was told by a co-worker that he was being accused of stealing a winch from the employer. Claimant contacted his supervisor in order to speak to Ms. Krause. Claimant spoke to Ms. Krause and told her that he received the winch which was listed for sale on the North Iowa Man Stuff website from a co-worker named Warren Gilpin. Claimant reported to her that he had painted several items for Mr. Gilpin at the end of February or beginning of March, 2016. Mr. Gilpin did not have the money to pay for the painting work that claimant performed for him and gave him

the winch as payment for the painting services. Claimant agreed to allow the employer to travel to his home to get the winch in order to determine whether or not it was the employer's stolen property. The employer did so and reviewed the serial number on the winch. The winch was the property of the employer.

Claimant, his wife, who also worked for this employer, and Mr. Gilpin were interviewed by Ms. Krause the following day. Claimant again told Ms. Krause that the winch was given to him by Mr. Gilpin. Mr. Gilpin stated that the winch found at claimant's home was not the winch he had given to the claimant for payment of the painting services he had provided to him.

Claimant and his wife were suspended pending investigation. Mr. Gilpin voluntarily quit his employment with the company. The employer reported the incident to the police department. Claimant gave a verbal and written statement to the police department. No charges have been brought against claimant regarding this matter; however, the investigation is still pending.

Mr. Gilpin had opportunity to steal the winches as he typically carried the winches outside to a barn for storage purposes. Claimant worked in the painting department and did not work with the winches but did paint the cranes that the winches were attached to on occasion. The claimant's department was approximately 20 feet from where claimant's work station was.

The employer determined that claimant was either involved in the theft of the property or should have known that he was in possession of stolen property from the employer. The employer does have an employee handbook which claimant received a copy of upon hire. The handbook states that an employee can be subject to discipline up to and including termination for theft, removal or possession of property.

Each of the winches that are used by the employer is grey in color. There was no identifiable marking on the winch that was stolen from the employer except the serial number. The serial number is seven digits and is listed on a metal plate which is one to two inches long.

While claimant received this winch from Mr. Gilpin in March of 2016, he did not list it for sale until June of 2016 because it had sat in his garage. Mr. Gilpin gave claimant the winch in the box that it came in. Claimant did not see at the time he received it that it did not have a neutral on it. When he took it out of the box and noticed this he decided that he was not going to be able to use it for his purposes. The winch did appear brand new when he received it from Mr. Gilpin. Claimant also asked Mr. Gilpin if he wanted additional payment for the winch at the time he received it because he knew that the winch would have cost approximately \$700.00 and his painting services only totaled \$500.00. Mr. Gilpin told him he did not want any additional payment because claimant was originally expecting cash for his painting services and not a winch.

REASONING AND CONCLUSIONS OF LAW:

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

As a preliminary matter, the Claimant did not quit. Claimant was discharged from employment.

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).

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the 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.

871 IAC 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.

Further, 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). 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).

There was no evidence presented that claimant intentionally or carelessness possessed the employer's property. Claimant was given the winch for painting services provided to Mr. Gilpin. Claimant was originally told he would be paid cash for his painting services but then accepted the winch when he was told by Mr. Gilpin that he did not have the cash to pay him. There were no identifying marks on the winch except the serial number, which claimant would not have known belonged to the employer. No other employees knew the winch was missing until claimant listed it for sale. As such, claimant had no knowledge that a winch had been stolen from the employer. Claimant cooperated immediately when he learned that the employer believed that he possessed its property.

This type of behavior does not rise to the level of misconduct. 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). There is no evidence that the claimant's actions had any wrongful intent.

The employer failed to meet its burden of proof in establishing a current act of disqualifying job misconduct. As such, benefits are allowed.

DECISION:

The July 11, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

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