

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**THEODORE F GARROSON**  
Claimant

**APPEAL NO: 18A-UI-06265-JC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**COMES INVESTMENTS INC**  
Employer

**OC: 05/13/18**  
**Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quitting  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

The employer, Comes Investments Inc., filed an appeal from the May 29, 2018, (reference 01) unemployment insurance decision that allowed benefits. After due notice, a telephone hearing was held on June 25, 2018. The claimant participated personally. The employer participated through Walter Githens, payroll manager. Jill Comes attended as an observer. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Did the claimant voluntarily quit the employment with good cause attributable to the employer?  
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can any charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as an assistant general manager and was separated from employment on May 4, 2018, when he was discharged.

The claimant was late to work on May 4, 2018, after working late the night before. The claimant denied being previously counseled about attendance or knowing his job was in jeopardy. The employer reported the claimant was warned on May 3, 2018, for being late "several times" but had no other details. The claimant stated he was warned on May 3, 2018, because he sent his employees home in advance of their shift end time.

The employer stated the claimant was also discharged for money missing from the register, not having a valid driver's license, being two hours late on April 25, 2018, staying late on April 26, 2018, for taking bags of pepperoni and cheese home, for money missing and for "not being a good manager" (Githens testimony). The employer did not present any witness who worked with the claimant or had details about specific incidents that contributed to the claimant's separation.

The claimant denied theft of product or money, stating he once paid out of pocket for frozen mozzarella sticks that were ordered in error, that he had not been warned for his attendance, and denied being a poor manager. The claimant indicated he worked hard, often staying late and covering shifts when the employer experienced shortages of staffing. He acknowledged he was late on May 4, 2018, due to oversleeping after working late the night before. He was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$858.00, since filing a claim with an effective date of May 13, 2018. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Mr. Githens was new to employment as payroll manager, and was getting acclimated/caught up on mail and did not realize the date and time of the fact-finding interview.

#### **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

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

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, it incurs potential liability for unemployment insurance benefits related to that separation. 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).

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.*

Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995). Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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.

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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. 871 IAC 24.32(4).

The employer presented no witness who performed work with the claimant, witnessed the conduct for which the claimant was discharged, or executed the discharge. None of these individuals participated in the hearing to refute the claimant's credible testimony. No request to continue the hearing was made to allow for their participation, and no written statements of those individuals were offered. The employer cited to serious allegations including theft of product and money, as well as repeated attendance infractions. Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's complete reliance on hearsay statements is unsettling. The hearsay evidence furnished by the employer was vague and without any specific details of dates or times. In comparison, the claimant provided detailed, specific first-hand testimony about conversations he had with management and credibly denied theft of money or product. Based upon a careful review of the claimant's direct, first-hand testimony and the employer's second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

At most, the administrative law judge concludes the claimant's tardy on May 4, 2018, due to oversleeping, which coincided with the day of his discharge, was an isolated instance of poor judgment. Inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the 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. Training or general notice to staff about a policy is not considered a disciplinary warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading to separation was misconduct under Iowa law.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

**DECISION:**

The May 29, 2018, (reference 01) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld shall be paid, provided he is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not relieved of charges associated with the claim.

---

Jennifer L. Beckman  
Administrative Law Judge

---

Decision Dated and Mailed

jlb/scn