

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**KIRBY A WEBER**  
Claimant

**MAJESTIC LIMOUSINE SERVICE LLC**  
Employer

**APPEAL 16A-UI-08079-JCT**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 06/26/16**  
**Claimant: Respondent (3)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1)a – Voluntary Quitting – Other Employment  
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 filed an appeal from the July 15, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 12, 2016. The claimant participated personally. The employer participated through Scott Woodruff, president. Claimant exhibits A, B, C, and D, and Employer exhibit 1 were received into evidence. 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?  
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 a chauffeur and was separated from employment on June 29, 2016.

The employer has a policy which designates points for policy violations, and when an employee reaches 100 points in a rolling one-year period, they are discharged. Prior to discharge, per the employer's policy, an employee receives a written warning, a 90-day probation and a five-day suspension. Employees are also offered opportunities to reduce points. The claimant was made aware of the employer's policy during employment. The claimant incurred 20 points on April 20, 2016, for being out of uniform. The claimant then received 75 points on June 9, 2016, for leaving a building unsecured that contained company vehicles. He received written

warnings for both incidents, and had a total of 95 points until June 23, 2016, when the claimant was 20 minutes late to a pick up, and incurred another 50 points. The employer did not discharge the claimant or issue a probationary period or suspension in accordance with its policy. Instead, Mr. Woodruff met with the claimant and confirmed with him his intent to remain employed. Three times, the claimant stated yes. The meeting ended without further disciplinary action issued.

On June 27, 2016, the claimant accepted a position through Aerotek Staffing, to work for a Wells Fargo branch. The official start date was July 26, 2016. On June 28, 2016, around 5:43 p.m., the claimant was mailed his next day schedule, which began at 5:30 a.m. for an entire day of driving. Around 7:30 p.m., the claimant submitted his resignation letter via email and informed the employer he would not be able to work due to orientation he had the following day. In his resignation, the claimant stated an intended last day of work of July 12, 2016. The claimant did not offer to work a shift around his orientation and simply called off the entire day.

The employer contacted people it knew at Wells Fargo who told them there was no new employee orientation on June 29, 2016. The claimant did attend orientation for his new job, but it was through Aerotek, the employer, and not the employer's client, Wells Fargo. The employer confronted the claimant via text message (claimant exhibit C) by way of Mrs. Woodruff, questioning the claimant about lying. The claimant in response furnished a copy of his Aerotek information (Claimant exhibit C). He was subsequently discharged. The employer and claimant furnished different reasons communicated to the claimant for his discharge. The claimant asserted he was discharged due to the employer thinking he was lying about his orientation after tendering his resignation. Mr. Woodruff at the hearing asserted it was due to the claimant by calling off. Mr. Woodruff was unable to identify how many disciplinary points the claimant received for calling off.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$844.00, since filing a claim with an effective date of June 26, 2016, for the two weeks ending July 9, 2016. (The two weeks coincide with the claimant's resignation period.) The administrative record also establishes that the employer did participate in the fact-finding interview by way of Scott Woodruff.

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

For the reasons that follow, the administrative law judge concludes the claimant tendered his resignation to accept other employment, but was discharged for no disqualifying reason prior to the intended resignation date.

Iowa Code § 96.5(1)a provides:

##### **Causes for disqualification.**

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:
  - a. The individual left employment in good faith for the sole purpose of accepting other or better employment, which the individual did accept, and the individual performed services in the new employment. Benefits relating to wage credits earned with the employer that the individual has left shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5.

In this case, the claimant tendered his resignation on June 28, 2016, to accept other employment. The claimant accepted a position through Aerotek, a staffing company, to work on assignment at Wells Fargo as a financial crime specialist. Even though the separation was without good cause attributable to the employer and would, standing alone, disqualify the claimant from receiving benefits, the claimant did leave in order to accept other employment and did perform services for the subsequent employer. Accordingly, benefits would be allowed under these circumstances.

The claimant sought and claimed benefits for the two-week period after tendering his resignation, because he intended to work until July 12, 2016, but was discharged by the employer on June 29, 2016.

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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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 Ct. 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. *State v. Holtz*, 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. *State v. Holtz*, Id.

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. Whether the claimant was discharged for allegedly lying to the employer for the reason of his call off, or for the call off itself, misconduct has not been established.

The credible evidence does not support that the claimant was dishonest to the employer when he called off approximately twelve hours in advance of his shift on June 29, 2016, after resigning. The claimant was honest in stating that he was attending an orientation, albeit for Aerotek, the staffing company which secured him an assignment at Wells Fargo. The administrative law judge is not persuaded that the claimant was obligated to explain to his employer the new employment arrangement, in terms of working on assignment at Wells Fargo for Aerotek (Claimant exhibit C), or that he evaded or lied to the employer.

Further, even if the claimant was discharged simply for calling off his shift, the employer has not established misconduct. The employer's disciplinary policy states the claimant will receive a 90-day probation and suspension without pay before discharge. The purpose of these disciplinary steps would reasonably put an employee on notice that their job was in jeopardy. In this case, the claimant had 95 points but was not issued probation or suspension, and then had another 50 points for his late arrival, which would have exceeded the permissible points, yet the claimant was not put on probation, suspended or even discharged. The employer only discharged the claimant after a call off, which was properly reported, but in conjunction with the

claimant's resignation being tendered. The administrative law judge is not persuaded that the timing of the resignation with the call-off can be ignored in the decision to discharge the claimant, since he previously had exceeded the permissible amount of points and had not faced discipline. Because the discharge was in response to a resignation notice no misconduct is established. Since the employer terminated the employment relationship in advance of the resignation notice effective date, the claimant is entitled to the benefits he received from the date of termination on June 29, 2016 until the effective date of the proposed resignation of July 12, 2016. The employer's account is chargeable for those benefits.

**DECISION:**

The July 15, 2016, (reference 01) unemployment insurance decision is modified in favor of the respondent. The claimant voluntarily left the employment in order to accept other employment but was discharged on June 29, 2016 for no disqualifying reason prior to the intended resignation date of July 12, 2016. Benefits are allowed, provided he is otherwise eligible. The claimant has not been overpaid and the employer's account is not relieved of charges incurred during the two week period ending July 9, 2016

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

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