

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

JORGE A ESCOBAR
Claimant

APPEAL NO. 18A-UI-09483-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

FBG SERVICE CORPORATION
Employer

OC: 08/19/18
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

FBG Service Corporation (employer) appealed a representative's September 6, 2018, decision (reference 01) that concluded Jorge Escobar (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 28, 2018. The claimant participated personally through Desiree Gayle and Laura Mier, Interpreters. The employer was represented by Karen Stonebraker, Hearings Representative, and participated by Amy Khalil, Human Resources Manager. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on July 26, 2016, as a full-time supervisor. He signed for the employer's handbook on July 26, 2018, but did not receive a copy. The claimant was assigned to clean the football/wrestling building and Iowa Western Community College (IWCC).

The claimant had a subordinate that he terminated four times but the employer continued to rehire the employee. The subordinate was a former girlfriend. The subordinate was terminated for working with the smell of alcohol on her breath, reporting to work late, and leaving work each night with a large garbage bag. One set of the claimant's keys were stolen around June 2018. The claimant reported this to his manager.

On August 13, 2018, the employer talked to the claimant and issued him a two-day suspension for not cleaning certain areas and performance issues. The claimant was suspended from working on August 13 and 14, 2018.

On August 14, 2018, while on suspension, the claimant talked to the head coach about when the football offices would be in use. The head coach gave the claimant a note stating "Football offices have been occupied 7 days a week from Aug 1st & will be used 7 days a week until middle of Dec." The claimant gave the note to his manager. On August 14, 2018, while the claimant was on suspension, the employer issued the claimant a Personnel Action Form telling him not to communicate with employees at IWCC. The employer demoted the claimant to cleaning specialist.

On August 16, 2018, a coach at IWCC aggressively approached the claimant saying items were stolen and the claimant would be fired. IWCC reported to the employer that two pair of sunglasses and \$100.00 was taken from an unlocked desk drawer. On or about August 17, 2018, the employer told the claimant he was terminated for suspicion of theft on August 15, 2018. The claimant denied the allegation.

On August 24, 2018, the former employee was caught by students at IWCC in the act of stealing items. Security was called and she was arrested. The claimant's building keys were found in her car, along with other items allegedly taken from students.

The claimant filed for unemployment insurance benefits with an effective date of August 19, 2018. The employer participated personally at the fact finding interview on September 5, 2018, by Amy Khalil.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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).

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). 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 employer did not provide enough evidence of job-related misconduct. There was no evidence to prove the claimant had anything to do with the missing items. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's September 6, 2018, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs