

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHEL R KOPF
Claimant

APPEAL NO. 10A-UI-03166-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CHRISTIAN RETIREMENT SERVICES INC
Employer

OC: 01/31/10
Claimant: Appellant (1)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated February 19, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on April 12, 2010. Claimant participated. The claimant was represented by Crystal Raiber, attorney at law, and Larry Lynch, attorney at law. Sieg Muehl was a witness for the claimant. Employer participated by Diane Ely, human resources director and William Mishler, director of buildings and grounds. The employer was represented by Tom Hobart, attorney at law. Biran Kroeger was a witness for the employer. The record consists of the testimony of Diane Ely; the testimony of William Mishler; the testimony of Brian Kroeger; the testimony of Michel Kopf; the testimony of Sig Muehl; and Employer's Exhibits 1-3.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a continuing care retirement community located in Iowa City, Iowa. The facility is commonly referred to as Oaknoll. The claimant was hired on January 6, 2009, as a full-time employee in the housekeeping department. His primary responsibility was floor care. The claimant's last day of work was January 29, 2010. He was terminated on that day for theft of Oaknoll property.

The incident that led to the claimant's termination occurred on January 27, 2010. Prior to that date, a contractor, who was doing some remodeling work at Oaknoll, told William Mishler, Oaknoll's director of buildings and grounds that some of his equipment was missing from a work bench in the first floor lounge. The contractor, Brian Kroeger, informed Mr. Mishler that he had noticed items missing on two different days. Mr. Mishler decided to put in a surveillance camera in the first floor lounge.

The surveillance tape recorded the claimant's actions on January 27, 2010. The lounge where the work bench was located was being totally remodeled. The claimant was responsible for floor care and there was no reason for him to be in the lounge. The tape, however, shows that the claimant came into the lounge. He picks up an item from the workbench and puts it in his pocket. He also takes a key from one of the cabinets that was being installed and puts that in his pocket as well. The item that the claimant picked up from the workbench belonged to Oaknoll and had been placed there by Mr. Mishler. It looks like a yellow highlighter. If the lid or top is removed, there is a screwdriver inside. The item does not look like a screwdriver unless the top is taken off.

On January 29, 2010, the claimant was shown the video by the employer. The claimant was informed that he was being terminated for theft of Oaknoll property. The claimant was then escorted to his locker. The yellow screwdriver was in the claimant's locker. There were also some leather bound books that Mr. Mishler identified as belonging to Oaknoll. The claimant told the employer that the books belonged to his son and that he (the claimant) had brought them to work to look at them.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. One of the most fundamental duties owed by any worker to his or her employer is the duty of honesty. Theft of company property would be a breach of that duty. The employer has the burden of proof to show misconduct.

After carefully considering all of the evidence in this case, the administrative law judge concludes that the employer has established misconduct. The administrative law judge reviewed the surveillance video several times. The claimant is depicted on that video as putting something in his pocket that he picked up from the workbench. The claimant admitted in his testimony that he did pick up that item and put it in his pocket and later in his locker. The video also shows that the claimant pocketed another item while he was examining cabinets that were being installed. The employer's witnesses testified that one of the keys to the cabinets was missing and the video does corroborate the testimony from the employer's witnesses.

The claimant's explanation of his conduct is not credible. First, the claimant had no reason to be in the lounge area. The lounge was being completely gutted and remodeled. The claimant was responsible for cleaning floors and there is no reason to clean a floor where construction is ongoing. The area was taped off by the contractor. Second, the claimant said he took the screwdriver because he needed one to tighten some screws. The difficulty here is that the item, which the administrative law judge personally examined, does not look at all like a screwdriver. The claimant did not stop to examine it and just put it in his pocket. Mr. Kroeger also testified that this screwdriver would have broken if the claimant had tried to use it to tighten the screws. Third, the screwdriver was found in the claimant's locker. He never explained why he did not immediately return it to the workbench after using it, if indeed that is what he did.

There was also evidence that the claimant had taken some books belonging to Oaknoll and put them in his locker. Mr. Mishler testified that he had seen those books in one of the libraries and had actually looked at them before they were found in the claimant's locker. The claimant testified that the books belonged to his son. One of the residents, Sieg Mueller, who served as an informal librarian for Oaknoll, was not familiar with them and did not think they belonged to Oaknoll. Mr. Mishler's testimony that he had personally seen the books and looked at them prior to their appearance in the claimant's locker, is credible. Even if the books did belong to the claimant's son, the video tape surveillance and the employer's witnesses establish that the claimant did take the screwdriver and the key from the cabinet.

The employer has sustained its burden of proof to show misconduct. Accordingly, benefits are denied.

DECISION:

The decision of the representative dated February 19, 2010, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid

wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs