

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ABDELNASSER A MOSTAFA
Claimant

ABRH LLC
Employer

APPEAL 20A-UI-00247-CL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/24/19
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

On January 7, 2020, the claimant filed an appeal from the December 30, 2019, (reference 01) unemployment insurance decision that denied benefits based on a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on January 29, 2020. Claimant participated. Employer participated through operations director David Harbin and was represented by Thomas Kuiper. Employer's Exhibit 1 was received.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on November 30, 2016. Claimant last worked as a full-time manager. Claimant was separated from employment on December 2, 2019, when he was terminated.

Employer has a policy prohibiting theft from the company. Claimant was aware of the policy.

Employer is a chain of restaurants. In November 2019, employer was doing a routine audit of the location where claimant worked. The audit revealed that an employee at the restaurant was using fraudulent gift cards to pay for guest purchases in employer's point of sale system and then pocketing the cash payment provided by the guest. There were approximately 40 transactions totaling more than \$4,000.00.

Employer noticed the employee access card used to make these transactions on the point of sale system was assigned to claimant's position. However, the employees at the restaurant often used cards assigned to positions other than their own when accessing the point of sale system.

Employer reviewed surveillance footage and believed claimant was the employee making the fraudulent transactions.

On November 18, 2019, employer confronted claimant with accusations of theft. Claimant denied the accusations.

On December 2, 2019, employer terminated claimant's employment for theft from the company.

Employer referred the matter to law enforcement, but no action has been taken as employer has not provided the law enforcement agency with requested supporting evidence.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 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 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.

The employer has the burden to prove the claimant was discharged for job-related misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer made the correct decision in ending claimant's employment, 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). Misconduct justifying termination of an employee and misconduct warranting denial of unemployment insurance benefits are two different things. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *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 is not 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). 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).

In this case, the employer showed it suspects claimant stole from the company. The testimony provided by operations director David Harbin was no more convincing than the denials made by claimant. Employer is the party in possession of the evidence necessary to prove its case. Employer asserts it has receipts of the transactions that are time and date stamped. Employer asserts it has surveillance footage. If this is true, employer has what it would take to tie the case together. But employer did not provide that evidence for the hearing. The administrative law judge also finds it curious the employer has not provided that information to law enforcement, even though a significant amount of money is involved and these events took place over two months ago.

In summary, employer failed to show it is more likely than not that claimant stole thousands of dollars from employer. Employer failed to establish claimant was terminated for misconduct.

DECISION:

The December 30, 2019, (reference 01) unemployment insurance decision is reversed. Claimant was separated for no disqualifying reason. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.



Christine A. Louis
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January 31, 2020
Decision Dated and Mailed

cal/scn