

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DUSTIN D GRAVES

Claimant

APPEAL NO: 15A-UI-01881-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

MIDWEST BASEMENT SYSTEMS INC

Employer

OC: 01/04/15

Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the February 5, 2015, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 12, 2015. The claimant participated in the hearing with former crew member Ryan Richard and former foreman Scott Williams. Jonathan Bishop, Financial Controller, participated in the hearing on behalf of the employer. Claimant's Exhibits One through Eighteen and Employer's Exhibits A through H were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time block crew mason for Midwest Basement Systems from May 5, 2014 to January 22, 2015. He was discharged because the employer believed he was violating the non-compete clause in his contract.

The claimant and Ryan Richards were hired May 5, 2014 with Foreman Scott Williams. All three previously worked for Forest and Associates and Mr. Williams made arrangements to begin working for the employer and was allowed to bring a crew consisting of the claimant and Mr. Richard when he accepted a position with this employer. They signed an employment contract that contained a non-compete agreement (Employer's Exhibit G).

In January 2015 other employees reported to the employer that a business card containing Mr. Williams name and personal cell phone, stating "Basement Wall Replacement Crew" was found in one of the employer's trucks, that Mr. Williams had purchased a truck and had lettering placed on it stating "Basement Wall Replacement Crew" and listing services performed with Mr. Williams personal cell phone on the side; and that Mr. Williams had incorporated and registered two websites called "Basement Replacement Experts" which also contained his personal cell phone number and itemized services offered, including duplication of those performed by the employer (Employer's Exhibits A, C, and D and Claimant's Exhibit Eleven).

The employer determined that based upon their prior working relationship, not only was Mr. Williams competing against it but so were the claimant and Mr. Richard as well. The claimant was not aware of Mr. Williams' business cards, his truck, or the websites until after his employment was terminated and denies that the trio performed any jobs outside those done during their normal course of business for the employer with the exception of some brick work done on new construction at Mr. Williams' uncle's house. The employer does not do new construction work or brick façade work like the type performed by the three employees on Mr. Williams' family member's home. After receiving the reports from employees about Mr. Williams' business cards, truck and websites the employer discharged the claimant as well as Mr. Richard and Mr. Williams for violating the non-compete clause in their contracts.

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 § 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).

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

While the employer believed the claimant, Mr. Richard and Mr. Williams' violated the non-compete clause in their respective employment contracts, it did not have any evidence linking the claimant to Mr. Williams' activities. The claimant credibly testified he was not aware of Mr. Williams having business cards printed or that he gave them to any customers, he did not see the truck Mr. Williams purchased in October 2014 until after the date of his separation and did not know Mr. Williams had two websites created in January 2015. The employer determined the claimant was in violation of the policy simply based on his association with Mr. Williams, not based on any concrete evidence demonstrating the claimant was involved with any other businesses Mr. Williams may or may not have been engaged in, during his employment with this employer.

When misconduct is alleged as the reason for the discharge and subsequent disqualification of benefits, it is incumbent upon the employer to present evidence in support of its allegations. Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. 871 IAC 24.32(4). The evidence provided by the employer does not establish disqualifying job misconduct on the part of the claimant as that term is defined by Iowa law. Consequently, the administrative law judge must conclude the employer has not met its burden of proof. Therefore, benefits are allowed.

DECISION:

The February 5, 2015, reference 02, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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