

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MATTHEW J HOLLINGSWORTH
Claimant

BLAZIN WINGS INC
Employer

APPEAL 16A-UI-04856-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/03/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 18, 2016, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on May 9, 2016. The claimant, Matthew Hollingsworth, participated and testified. The employer, Blazin Wings Inc., participated through hearing representative, Thomas Kuiper, and general manager, Scott Peel. Employer's Exhibits 1 through 5 were received into evidence.

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 was employed part time as a server from March 18, 2016, until this employment ended on April 3, 2016, when he was discharged.

On April 1, 2016, claimant sent a private Facebook message to a friend of his indicating that he had recently waited on some of her family members. (Exhibit 1). Claimant informed his friend that her family stayed at the restaurant for a long period of time and left an unsatisfactory tip. Claimant asked his friend to please let her family know that these things interfered with his income. Claimant's friend showed the Facebook message to some of her family members, at least two of whom then complained to Peel.

Claimant's conduct violated the employer's social media and treatment of guest policies. The social media policy instructed employees to be respectful, fair, and courteous to team members, managers, guests, and vendors on social media. (Exhibit 5). The treatment of guests policy states that servers should never confront a guest about an unsatisfactory tip and should direct any issues with a guest to the manager. Both of these policies are located in the employee handbook, which claimant received a copy of upon being hired.

Prior to this incident, claimant had received two written warnings for violating the social media policy. (Exhibit 3). Both of claimant's prior warnings related to posts he made on a Facebook page set up for employees of this particular restaurant location and were deemed to contain inappropriate comments about a coworker. Claimant was given his first written warning about such conduct on February 5, 2016 and his second warning on February 21, 2016. The second warning specifically advised claimant to restrain from posting ill-mannered comments on social media sites and notes that discussions were held regarding more effective and appropriate ways of dealing with issues that may arise. Both warnings advised claimant that failure to improve may result in termination.

On April 3, 2016, Peel called claimant into a meeting to discuss his April 1 message. Claimant admitted to sending the message and apologized. The decision was made to terminate claimant's employment at that time. During the hearing claimant testified that he did not believe this conduct violated the social media policy as it was sent through a private Facebook message, rather than posted on a public site. Claimant also testified he was aware that contacting a customer directly to complain about a tip would certainly be a violation on the employer's policy. However, claimant maintained he believed such conduct would be acceptable if he used a social media message to a third party to deliver his message rather than contacting the customer directly.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 proof in establishing disqualifying job misconduct. *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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). 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).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented substantial and credible evidence that claimant continued to violate the social media policy, even after having been warned twice. Claimant's second written warning directed him to refrain from using social media to post unsuitable comments and to use more appropriate means to deal with issues. Despite these warnings, claimant continued to engage in similar behavior. Additionally, claimant testified he knew reaching out to a customer was a violation of the employer's policies. It is not reasonable to believe that an individual who was aware of this policy would believe such conduct to be acceptable by simply using a third party to convey their dissatisfaction. While it is understandable why claimant would be frustrated with the situation, this does not excuse his behavior. When claimant sent his Facebook message, he deliberately chose to violate the employer's treatment of guest policy. This is disqualifying misconduct.

DECISION:

The April 18, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/pjs