

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time security officer from August 2, 2005 until he was discharged on September 11, 2005. The claimant was discharged for a violation of the employer's handbook appearing at chapter 6, group 2, number 2, providing for discharge when one's work performance is not up to the employer's standards. The employer alleges that the claimant's work performance was not up to the employer's standards because of an incident on September 11, 2005, at approximately 9:35 a.m. The claimant at that time was assigned to the entrance of a gated community. The claimant's function was to control access to the community. The claimant began his shift at 11:00 p.m. on the day before, September 10, 2005. At approximately 5:35 a.m. the claimant was sitting in the gatehouse and he saw auras or ghosts on the television monitor. The claimant's car was parked approximately 25 to 30 yards from the gatehouse. The claimant looked outside at his car and saw people around his car. He saw numerous people. When he turned his flashlight on the people disappeared, but when he turned his flashlight off he was able to see them again. These individuals appeared to be ghosts or apparitions. These ghosts or apparitions were around the claimant's car.

The claimant radioed the employer and spoke to the duty supervisor, Scott Nance. He told Mr. Nance that there were people or persons by his car. Mr. Nance immediately dispatched the Lead Patrol Officer, Michael Lovell to the scene. When Mr. Lovell arrived he found the claimant very agitated. The claimant told Mr. Lovell that he had seen numerous apparitions or ghosts. Mr. Lovell could see nothing. The claimant was still seeing these apparitions or ghosts while Mr. Lovell was there and in the claimant's presence. Mr. Lovell called the employer's office and spoke to Eric Willcox, Operations Supervisor and one of the employer's witnesses. He explained the situation to Mr. Willcox. Mr. Willcox immediately drove out to the area. When Mr. Willcox arrived, Mr. Lovell and the claimant were still there. Mr. Willcox saw no one around the gate except that an occasional car might go through, which was not unusual for that time in the morning. The claimant told Mr. Willcox that he was still seeing the auras or ghosts and apparitions and that they were swirling around Mr. Willcox. Mr. Willcox saw nothing. Mr. Willcox could observe no symptoms of intoxication on the part of the claimant nor could he see any signs that the claimant had been drinking. Mr. Willcox could also observe no symptoms of drug use by the claimant nor did he see any evidence of such drug use. Mr. Willcox relieved the claimant of his duties and took over the claimant's duties at the gated community. Four or five hours later Mr. Willcox called the claimant and told him that he was discharged because he was unfit for duty.

The claimant had never seen ghosts or apparitions before but still believes that they were there. The claimant believes that what he saw were ghosts or apparitions. The claimant testified that he was working "weird hours" or at night and he was having a hard time adjusting and getting proper sleep. However, the claimant still believes that what he saw were actually ghosts or apparitions and not delusions caused by sleep deprivation. During the week prior to September 11, 2005, the claimant worked the following hours: Monday, September 5, 2005, 3:00 p.m. to 11:00 p.m.; Tuesday, September 6, 2005, 3:00 p.m. to 11:00 p.m.; Wednesday, September 7, 2005, 11:00 p.m. to 7:00 a.m.; Thursday, September 8, 2005, the claimant was off; Friday, September 9, 2005, 11:00 p.m. to 7:00 a.m.; and Saturday, September 10, 2005, 11:00 p.m. to 7:00 a.m. When the claimant was first hired he was told that he might be working nightshifts and in fact he did work nightshifts. The claimant has received no relevant warnings or disciplines.

Pursuant to his claim for unemployment insurance benefits filed effective September 11, 2005, the claimant had received no unemployment insurance benefits. Workforce Development records show no weekly claims for benefits or any payment to the claimant for unemployment insurance benefits.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on September 11, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for

disqualifying misconduct. It is well established that the employer has a burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct.

The main facts of this matter are not in dispute. While employed as a security officer at the entrance of a gated community, the claimant saw ghosts or apparitions when others on the scene saw nothing. There was no evidence that the claimant was either intoxicated or under the influence of drugs. The claimant had never seen ghosts or apparitions before but maintains yet that he saw ghosts or apparitions and that they were there. The claimant testified that he believed he was under sleep deprivation for working nights when he was not accustomed to working nights. However, the claimant testified that he still believed that he saw ghosts and that he did not see hallucinations or imagine seeing these things because of sleep deprivation. On the evidence, the administrative law judge is constrained to conclude that the claimant legitimately believes that he saw ghosts or apparitions while on duty as a security guard at the entrance of a gated community. The administrative law judge must further conclude that such sightings were only in the imagination of the claimant because two other persons on the scene could not see what the claimant said he saw. The claimant saw these ghosts or apparitions while the individuals were present and those individuals saw nothing.

The administrative law judge is constrained to conclude that such sightings or such beliefs do render the claimant unfit to act as a security guard. The employer cannot have security guards who see ghosts and apparitions and inform the employer and then the employer sends out the patrol cars. However, the real issue here is whether the sighting of such ghosts or apparitions is disqualifying misconduct. The administrative law judge is reluctantly constrained to conclude that such sightings are not disqualifying misconduct. The administrative law judge concludes that the claimant truly believes that he saw those ghosts or apparitions. Accordingly, the administrative law judge concludes that the sighting and the report thereof are not deliberate or willful acts on the part of the claimant and are not disqualifying misconduct for those reasons. The administrative law judge is also reluctantly constrained to conclude that such sightings and the claimant's reporting thereof is not carelessness or negligence of such a degree of recurrence, so as to establish disqualifying misconduct. The claimant believed he saw the ghosts and this is not negligence. Further, there is no evidence that the claimant had ever received any warnings or disciplines for such behavior or that he had ever seen ghosts or apparitions before. Failure in good performance as the result of inability or incapacity is not disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge is reluctantly constrained to conclude that the claimant was discharged, but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature and related to willful or deliberate conduct on the part of the claimant or recurring negligence. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge is constrained to conclude that there is insufficient evidence of such substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received no unemployment insurance benefits since separating from the employer herein on or about September 11, 2005 and filing for such benefits effective September 11, 2005. Even if the claimant had received unemployment insurance benefits he would not be overpaid any unemployment insurance benefits related to his separation from the employer herein.

**DECISION:**

The representative's decision of September 27, 2005, reference 01, is affirmed. The claimant, Wade R. Gallegos, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein. The administrative law judge notes, nevertheless, that the claimant has received no such unemployment insurance benefits.

dj/kjw