

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

IAN E LEE
Claimant

APPEAL NO. 17A-UI-08710-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

NPC INTERNATIONAL INC
Employer

OC: 07/16/17
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

NPC International (employer) appealed a representative's August 15, 2017, decision (reference 03) that concluded Ian Lee (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 15, 2017. The claimant participated personally. The employer participated by Kevin Williams, Area General Manager, and Bonita Pevey, Unemployment Insurance Consultant. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on May 18, 2016, as a full-time restaurant general manager. The claimant signed for receipt of the employer's handbook on May 18, 2016. On or about June 28 and July 5, 2017, the area general manager talked to the claimant about his weekly inventory audits. There appeared to be discrepancies in the numbers. The general manager told the claimant that if he were manipulating the numbers, he could be terminated.

The claimant's dog was ill and the claimant had not been sleeping well. The claimant also has a medical condition which can cause periods of loss of concentration. On July 11, 2017, the claimant performed his weekly audit to the best of his ability. On July 12, 2017, the general manager noticed the numbers were slightly off but thought the discrepancy could be due to sales. On July 13, 2017, the general manager again told the claimant he could be terminated if he were manipulating numbers. The general manager planned to have an inventory audit on July 18, 2017.

On July 18, 2017, the claimant and the general manager each counted half of the items in the store. The general manager entered numbers and told the claimant he found a \$1,873.64

inventory deficient. The general manager terminated the claimant on July 18, 2017, for manipulating numbers.

The claimant filed for unemployment insurance benefits with an effective date of July 16, 2017. The employer provided the name and number of Bonita Pevey as the person who would participate in the fact-finding interview on August 14, 2017. The fact finder called Ms. Pevey but she said she had nothing to add to the documents the employer provided for the fact finding interview. The employer did not submit the specific rule or policy that the claimant violated which caused the separation. She did not have firsthand knowledge of the events leading to the separation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 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 disqualification shall continue 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 Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Misconduct connotes volition. A

failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. *Huntoon v. Iowa Department of Job Services*, 275 N.W.2d 445 (Iowa 1979). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988). The employer discharged the claimant for poor work performance and has the burden of proof to show evidence of intent. The employer did not provide any evidence of intent at the hearing. The claimant demonstrated he worked to the best of his ability and did not improve after warning. Consequently the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's August 15, 2017, decision (reference 03) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs