

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**GARY A NORRIS**

Claimant

**APPEAL NO: 11A-UI-00778-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CEDAR RAPIDS COMM SCHOOL DIST**

Employer

**OC: 12/20/09**

**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge  
Section 96.5-2-b, c – Gross Misconduct

**STATEMENT OF THE CASE:**

Gary A. Norris (claimant) appealed a representative's December 23, 2010 decision (reference 02) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Cedar Rapids Community School District (employer), which was further found to be due to gross misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 23, 2011. The claimant participated in the hearing. Matt Dunbar appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Was the claimant discharged for gross misconduct?  
Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

After a prior period of employment with the employer, the claimant most recently began working for the employer on May 12, 2010. He worked part time as a bus driver. His last day of work was November 17, 2010. The employer suspended him as of that time and subsequently discharged him. The reason asserted for the discharge was the claimant's theft of money from a school athletic booster club.

On November 5 the claimant was serving as a volunteer at a booster club's concession stand at an athletic event. The claimant had regularly served as a volunteer in the concession stand for many years, going back significantly prior to any employment with the employer. In a moment of weakness, he pocketed approximately \$200.00 from the cash drawer. Someone else saw him, and alerted security and Mr. Dunbar, the associate director of human resources. They confronted the claimant, who immediately admitted that he had taken the money due to personal financial issues. He was then charged with fifth degree theft.

The claimant was not at work from that date until November 17, as he was hospitalized from November 8 through November 16. Because of the theft charge, the claimant was then suspended, and subsequently discharged. On December 17 the claimant pled guilty to the fifth degree theft charge, and subsequently sentenced for such.

#### **REASONING AND CONCLUSIONS OF LAW:**

The first issue which will be addressed is whether the claimant was discharged for gross misconduct. Iowa Code § 96.5-2-b and c provide that if the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

- b. If gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.
- c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

An "indictable offense" is an offense other than a simple misdemeanor. Iowa Code § 801.4. In terms of theft of property, in order to be at least a serious misdemeanor, the monetary value of the property taken must be at least \$200.01. Iowa Code § 714.2(4). The claimant may have verbally admitted to the theft of money of "approximately" \$200.00, but there is no evidence there was any signed statement by the claimant admitting to the theft of over \$200.01. He pled guilty and was thereby convicted of fifth degree theft. Fifth degree theft is "the theft of property not exceeding two hundred dollars" and is a simple misdemeanor. Iowa Code § 714.2(5). The claimant was not discharged for "gross misconduct" as defined by law.

The next question is as to whether the claimant was discharged for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is his being charged with the theft of the booster club's concession money. Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work connected." Diggs v. Employment Appeal Board, 478 N.W.2d 432 (Iowa App. 1991). However, the court has concluded that some off duty conduct can have the requisite element of work connection. Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, it has been found:

In order for an employer to show that its employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence:

[T]hat the employee's conduct (1) had some nexus with her work; (2) resulted in some harm to the employer's interest, and (3) was in fact conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer.

Dray v. Director, 930 S.W.2d 390 (Ark. App 1996); In re Kotrba, 418 N.W.2d 313 (SD 1988), quoting Nelson v. Department of Employment Security, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§77-78.

The claimant was serving as a volunteer at the concession stand, and was not there in any direct connection between being a volunteer with the booster club concession stand with his bus driving job with the employer. He was not a volunteer because he was a bus driver, nor was he a bus driver because he was a volunteer. The only connection is that both his job and the booster club are related to the school district. While there was a harm to the school district, this was because of the claimant's actions as a volunteer, not as a bus driver. The employer has not established that it has some clear code of behavior that an employee's off-duty conduct, even if criminal, is prohibited and could result in discharge.

While the employer had a good business reason for discharging the claimant, it has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

**DECISION:**

The representative's December 23, 2010 decision (reference 02) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The discharge was not for gross misconduct under the statute. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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