

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**RYAN F ZUCK**  
Claimant

**OFFICE INSTALLATION SERVICES INC**  
Employer

**APPEAL 17A-UI-06032-LJ-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/14/17**  
**Claimant: Respondent (1)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

The employer filed an appeal from the June 7, 2017 (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant was discharged and the employer did not establish willful or deliberate misconduct. The parties were properly notified of the hearing. A telephone hearing was initially scheduled for June 28, 2017, and it was continued to July 11, 2017. The claimant, Ryan F. Zuck, participated. The employer, Office Installation Services, Inc., participated through Jody Kimrey, President. Employer's Exhibit 1 was received and admitted into the record without objection.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time, most recently as a furniture installer, from September 12, 2012, until May 19, 2017, when he was discharged. The employer alleges that one of claimant's coworkers came to management and reported that claimant handed out his personal business card to the coworker to try and recruit this person to work for him. Kimrey testified that the business card stated the business name Iowa Office Business Solutions and listed a website, a fax number, and a phone number. Claimant denies the number listed on the card is his telephone number. The administrative law judge notes the number is different from the number where the administrative law judge reached claimant for the hearing. When Kimrey spoke to claimant about this and presented him with the business card, he stated that it was a joke. Claimant testified that the business card at issue came from an acquaintance of his trying to recruit him for a position. He shared it with two coworkers after he turned down that employment offer.

Claimant received a warning on January 3 for performing work after business hours for one of the employer's business clients. Claimant admits that he did this. He testified that he delivered several chairs outside of work to a client. Claimant denies he did anything similar after the employer warned him this was not permitted. The employer testified that claimant had previously gone to job sites and handed business clients his own personal business card. It is unclear when he did this or whether he was told this was not appropriate. Claimant received a copy of the employee manual. He testified that the employer generally requires each employee to sign a non-compete agreement, but claimant never signed one.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,248.00, since filing a claim with an effective date of May 14, 2017, for the eight weeks ending July 8, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview.

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

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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). In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

Claimant contends that he was given a business card by someone trying to recruit him for employment. While he admits sharing this card with coworkers, he denies that this was his business and denies that he was attempting to recruit coworkers to alternate employment. Kimrey testified that one of claimant's coworkers brought her the business card and reported that claimant tried to recruit him. Kimrey was not present when this occurred, and claimant's firsthand testimony regarding the exchange is more credible than her second-hand report. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds claimant provided credible testimony regarding the business card.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Here, the employer has not met its burden of proof to establish that claimant was discharged for disqualifying, job-related misconduct. Specifically, the employer has not proven that claimant attempted to recruit coworkers for his side business while working for the employer. Benefits are allowed, provided claimant is otherwise eligible. As claimant's separation from employment is not disqualifying, the issues of overpayment, repayment, and chargeability are moot.

**DECISION:**

The June 7, 2017 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot.

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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed

lj/scn