

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GARRET L MILLER
Claimant

APPEAL NO. 07A-UI-01837-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NEIGHBORHOOD PATROL INC
Employer

**OC: 01/21/07 R: 02
Claimant: Respondent (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Code section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Neighborhood Patrol, Inc., filed a timely appeal from the February 16, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 7, 2007. Claimant Garret Miller participated. Dick Rogerson, Director of Human Resources, represented the employer and presented additional testimony from Security Officer Dick Beal. The administrative law judge took official notice of the Agency record of benefits disbursed to the claimant.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Garret Miller was employed by Neighborhood Patrol, Inc., (NPI) as a full-time Security Officer from October 25, 2005 until January 25, 2007, when Account Manager Eric Wilcox discharged him for leaving his post unattended and without securing proper coverage. Mr. Miller had been assigned to perform security duties at the C.D.S. facility in Des Moines. Mr. Miller had been in the assignment for several months prior to the incident that prompted his discharge. C.D.S. processes large sums of money submitted by mail. The security officers were charged with securing the C.D.S. facility. The security officers were also charged with monitoring the C.D.S. employees who opened the incoming mail to make certain none was stealing from the employer. Dick Beal was an NPI security officer assigned to monitor the C.D.S. employees opening the mail. At Mr. Beal's post were three surveillance monitors that were linked to 14 surveillance cameras aimed at the C.D.S. employees. Mr. Beal's responsibility at that post was to review the surveillance monitors and manipulate the surveillance cameras as necessary to prevent employee theft. Based on concerns that Mr. Miller played on the computer rather than attending to his duties when filling in for Mr. Beal, NPI Account Manager Eric Wilcox had

aimed a camera on the security post for the purpose of monitoring Mr. Miller. Mr. Miller regularly filled in for Mr. Beals when Mr. Beals went on his lunch break and was familiar with the responsibilities relating to Mr. Beals' post.

The final incident that prompted the discharge occurred on January 24, 2007. Mr. Miller reported to Mr. Beals post at 6:00 p.m. so that Mr. Beals could go on his 45-minute lunch break. At 6:00 p.m., Mr. Beals went to a nearby break room. At 6:05 p.m., Mr. Miller left the security officer's post unattended and went to use the restroom. Mr. Miller had not alerted anyone to the fact that he was leaving the post. Mr. Miller knew that he was required to secure proper coverage for the post if he needed to leave. After his trip to the restroom, Mr. Miller entered the break room and purchased a soda. Mr. Miller then lingered in the break room for 24 minutes. Mr. Miller told Mr. Beals that he was not going to work in an area where a camera was aimed at him. Out of concern that Mr. Miller had left the post unmanned, Mr. Beals returned to his post at 6:32 p.m., prior to the end of his scheduled lunch break.

On January 25, Mr. Wilcox reviewed the surveillance video from the security post and observed that the post had been left unmanned for an extended period. Mr. Wilcox discharged Mr. Miller from the employment the same day.

Mr. Miller established a claim for benefits that was effective January 21, 2007, and has received benefits totaling \$855.00.

REASONING AND CONCLUSIONS OF LAW:

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record establishes that Mr. Miller intentionally left his assigned security post unattended on January 24. Mr. Miller was at the post for the purpose of monitoring C.D.S. employees and to prevent theft from C.D.S. Mr. Miller knew he could not properly perform the duties of that particular post if he stepped away from the post. Mr. Miller knew he had to secure coverage for the post before he left the post. Mr. Miller failed to notify anyone that he was leaving the post, despite the fact that a C.D.S. supervisor was accessible. After Mr. Miller left the post, Mr. Miller intentionally stayed away from the post an extended period to avoid being observed or documented on the surveillance camera. The evidence does not indicate mere negligence, but instead indicates an intentional and wanton disregard of the interests of the employer and violation of reasonable standards of conduct. The essence of Mr. Miller's employment was to provide security and Mr. Miller intentionally failed to provide security.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Miller was discharged for misconduct. Accordingly, Mr. Miller is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Miller.

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.

Because Mr. Miller has received benefits for which he has been deemed ineligible, those benefits constitute an overpayment that Mr. Miller must repay to Iowa Workforce Development. Mr. Miller is overpaid \$855.00.

DECISION:

The Agency representative's February 16, 2007, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged. The claimant is overpaid \$855.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs