

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEVE SHURTZ

Claimant

APPEAL NO: 12A-UI-01823-B

**ADMINISTRATIVE LAW JUDGE
DECISION**

MASON CITY FORD LINCOLN MERCURY

Employer

OC: 01/01/12

Claimant: Respondent (1)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Mason City Ford Lincoln Mercury (employer) appealed an unemployment insurance decision dated February 17, 2012, reference 01, which held that Steve Shurtz (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was held in Mason City, Iowa on April 5, 2012. The claimant participated in the hearing with Virginia Merritt, attorney at law. The employer participated through Jim Skarliss, regional manager; Ron Lafrenz, controller; and Richard Piscopo, attorney at law. Employer's Exhibit One and Claimant's Exhibit A were admitted into evidence. 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.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed full-time from March 20, 2011 until December 22, 2011, when he was discharged with his supervisor, Tim Behm, and seven other employees. Tim Behm, his brother Scott Behm and their father, John Behm, Sr., were all subsequently arrested and charged with 39 different counts of theft, forgery, and fraud resulting from criminal activity while working for the employer. The claimant was hired and supervised by Tim Behm, who was the general manager of the dealership until he was fired.

The employer began an internal investigation in the latter part of October 2011 after receiving a tip from the Cerro Gordo County Treasurer's office. The treasurer's office collects license, title, and a use tax and is required to report any questionable activity. The treasurer's office noted some suspicious activity in repeated motor vehicle transactions wherein cars were being sold to employees, their family members, or friends, for less than their market value.

Once the employer received the information, it hired a retired Waterloo police officer to begin a thorough investigation and then turned the information over to the Mason City Police, who began its own investigation. It was determined the employer sustained a significant financial loss due to employee fraud. Additionally, the Department of Transportation is conducting its own investigation and even the FBI is involved.

The claimant's actions that prompted the termination were solely directed by his supervisor, Tim Behm. The claimant was initially hired as an internet manager but was transferred to the IT administrator position a few months later because a more qualified person was hired for his position. During the claimant's employment, he purchased some virus software on the employer's company credit card, which did not work with the employer's system. Mr. Behm submitted a written statement indicating that the claimant only had access to the company credit card through him. The software was called Kaspersky Virus Software and the software was reportedly not compatible with the employer's data software program. The employer concluded that the claimant had to have purchased this software for a personal computer.

The claimant testified that Tammy Saidat had previously installed this software on several computers but it had not been updated and had been removed from some computers. He said that it worked but certain settings had to be changed and that had not been done. The claimant said he was trying to use and update the programs for which the employer had already paid, since some of them were still on a warranty.

The employer said the claimant worked on personal computers during company time. The claimant admitted he worked on personal computers but claimed he worked on them after work and at no cost because he enjoys the work and likes to help his friends. The employer said the claimant had remote access to the employer's computer system which bypassed the firewalls that were supposed to protect it. He bragged that he had software that he could hack into employee's emails. No one else had remote access to the computer system and no one should have had it, due to the detailed financial data it contains. The claimant denied that he had remote access to the employer's computer system and provided plausible explanations for the employer's allegations.

The regional manager was informed on December 2, 2011 that Tim Behm had fired Marsha, the title clerk/cashier, after she had worked there for 20 plus years. This was done without discussion and after regular work hours on December 1, 2011, when no one was there. Mr. Behm placed the claimant in Marsha's position on December 3, 2011 by 8:00 a.m. even though the claimant had no experience or training in this area. Regional Manager Jim Skarliss subsequently asked Mr. Behm why he fired Marsha and Mr. Behm stated that Marsha was not a good employee. He said she ate at her desk and was not intelligent, as well as other issues. Marsha had previously questioned Mr. Behm about the suspicious vehicle transactions and was told not to worry about it. When Mr. Skarliss questioned Mr. Behm about why he put the claimant in that position when he had no training or experience, Mr. Behm said that the claimant was not a good employee and he had to be put him somewhere or Mr. Behm was going to have to let him go. The claimant testified that he went to the courthouse and trained for part of a day.

The claimant introduced an affidavit dated March 28, 2012 from Mason City Police Detective Terrance Prochaska, who reported that he was responsible for the criminal investigation at the employer's facility. He stated that he has made several arrests and caused criminal charges to be brought against several former employees of the dealership. Detective Prochaska was not aware of any evidence incriminating the claimant in any crime involving the employer.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant 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.

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 to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). 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 claimant was discharged on December 22, 2011 with several co-employees, three of whom were charged with multiple felonies resulting from actions while employed with the employer. There was no evidence disputing the claimant's statements regarding the Kaspersky software; but, even if there had been, his supervisor approved the charges. The claimant denied he had remote access to the employer's computer system and the employer could not prove that he did until after the discharge occurred. The fact that the employer hired two computer companies after the fact and learned that the claimant did have remote access to the employer's computer system on December 22, 2011, cannot be considered, since that information was not relied upon when making the decision to discharge the claimant.

While the claimant's conduct may certainly appear questionable, he was acting on his supervisor's directives. It is unknown whether he had any further knowledge as to the criminal activity that was taking place. The evidence provided by the employer does not rise to the level of disqualifying misconduct as defined by the unemployment insurance law. Benefits are therefore allowed.

DECISION:

The unemployment insurance decision dated February 17, 2012, reference 01, is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/kjw