

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID MINNIHAN

Claimant

APPEAL NO: 13A-UI-01990-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

RICHARD MCDOWELL

Employer

OC: 01-13-13

Claimant: Respondent (2R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 11, 2013, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 18, 2013, and continued on May 1, 2013. The claimant participated in the hearing. Richard McDowell, Owner and Kathy Falconer, Secretary, participated in the hearing on behalf of the employer. Employer's Exhibit One was admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time secretary/manager of the employer's second facility for RW McDowell Truck & Auto Repair from October 20, 2011 to January 14, 2013. He was discharged for installing computer software at an employee's home and because he had knowledge of that employee stealing from the employer.

Secretary Carolyn McCluer asked the claimant to install a computer program the employer uses on her home computer. The program requires a user password and gave Ms. McCluer access to company information from her home. The claimant did not consult Owner Richard McDowell about installing the program at Ms. McCluer's home. The employer's policy prohibits the removal of company property or information from the employer's premises and the employer does not even have that program on his home computer. After the employer learned of the situation he demanded the claimant immediately uninstall the program and the claimant did so.

Ms. McCluer was caught embezzling money from the employer and was charged by the Manchester Police Department after the employer reported the theft. When the employer confronted Ms. McCluer he stated he could not believe she came up with the plan to steal from him and she stated the claimant told her she was in charge of the check book and she should

go ahead and write herself a check. He also told her how to cover it up “so no one would know” (Employer’s Exhibit One). Ms. McCluer then wrote herself a check in October, November and December 2012 with the claimant’s knowledge of the situation. In her statement to the Manchester Police Department the claimant stated, “I have no one to blame but myself but had (the claimant) not encouraged me I probably wouldn’t have done this” (Employer’s Exhibit One).

The employer had a “no charge” policy. The claimant allowed his sister-in-law to charge some mechanical work in the amount of \$1,600.99 without discussing it with the employer and asking if he could make an exception for his relative. When employees questioned the claimant’s actions he indicated he would “do whatever (he) wanted.”

The employer asked the claimant to do inventory in July 2012 but the claimant never completed that task. When the employer asked the claimant if he had it done toward the end of his employment he stated, “Fuck, no I didn’t do it.” The employer had 32 pages of verbal and written warnings to the claimant during his tenure with the employer. The claimant refused to communicate with the employer about pricing issues. The employer opened a new shop with a full-time mechanic April 4, 2012, and the claimant worked as the secretary/manager at that store. The parties had several conversations about how to bring in new business and after several months of losing money at that store the employer decided to move the mechanic to the first store and just send him over to the new store when there were scheduled jobs. When the claimant worked at the main office he entered invoices and completed price changes daily but failed to do those tasks at the new store. He refused to communicate with the employer regarding work related issues that should have involved the employer’s input. The employer also had “constant conversations” with the claimant about getting his work done. After considering all of the above information the employer terminated the claimant’s employment January 14, 2013, for failing to fulfill his work duties.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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 proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant did not consult the employer about going to Ms. McCluer's apartment to install a software program that she would only use for work-related purposes in violation of the employer's policy prohibiting the removal of any company property or information from the employer's premises. Additionally, he effectively instructed her how to steal money from the employer and cover it up so she would not get caught which allowed her to embezzle money from the employer. He was aware of the situation but did not report it to the employer. He also failed to complete inventory the employer assigned him to do in July 2012 by January 14, 2013, and when the employer questioned him about it the claimant stated, "Fuck, no I didn't do it." The claimant allowed his sister-in-law to charge \$1,600.99 in violation of the employer's no-charge policy. The claimant received 32 verbal and written warnings during his 15 months of employment with this employer but despite those warnings the claimant did not change his behavior and appeared to do whatever he wanted without regard for the employer's wishes, policies or procedures, even advising and encouraging an employee to engage in embezzlement. Many of these situations, even when considered alone, rise to the level of disqualifying job misconduct. When taken together, however, there is no doubt the claimant's actions were disqualifying job misconduct as that term is defined by Iowa law.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not

received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The February 11, 2013, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as 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 claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs