IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BOYD C JAMES
Claimant

KINSETH HOTEL CORPORATION
Employer

APPEAL NO. 15A-UI-07881-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/31/15
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Kinseth Hotel Corporation (employer) appealed a representative's June 30, 2015, decision (reference 02) that concluded Boyd James (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 31, 2015. The claimant participated personally. The employer was represented by Dina Smith, Hearings Representative, and participated by Sandy Vanden Bosch, Controller; Andrew Ruiz, Accounting Supervisor; and Katie Barry, Claims Specialist. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on September 22, 2014, as a full-time staff accountant. The claimant signed for receipt of the employer's handbook on June 5, 2015. The handbook states, "Usage of personal cell phones for phone calls or text messaging is prohibited while working. These activities are limited to Supervisors or Manager on Duty for business purposes only. Employees may use their cell phones during approved break and meal periods. An employee who violates this policy may be subject disciplinary action up to and including termination." All employees had their cell phones within reach while they worked. One employee had a nanny cam on her desk. The employer has never reprimanded or terminated any employee for sending an emergency type of text from their desk.

On January 19, 2015, the accounting supervisor told the claimant through an email that his cell phone was going to cause a problem at work. The supervisor told the claimant he could use his cell phone at work for music only. The employer did not warn the claimant of any action in the future. On January 22, 2015, the employer issued the claimant his training review. The review reiterated that the cell phone was only allowed for music. The quality of work turned in was described as "what is expected from a 3-month employee". On March 13, 2015, the employer

issued the claimant a coaching and counseling for performance issues. The employer lists numerous problems with the claimant's performance. Then the claimant's work was described as "not bad for an employee in training". The January 19, 2015, cell phone issue was mentioned again.

The employer placed the claimant on a performance improvement plan that ran from March 30 through April 30, 2015. The employer notified the claimant that failure to comply with the action plan could result in loss of employment. The claimant complied with the action plan.

On April 22, 2015, the claimant was only using his cell phone to listen to music. The accounting supervisor could not get the claimant's attention easily because the claimant's music was loud. The supervisor told the claimant he could not use his cell phone for music because it was too loud. The claimant understood and asked if he could use his phone in case of emergencies with his young son. The employer told him he could. If it were a telephone call, the claimant should go in the break room or outside for privacy. On April 23, 2015, the accounting supervisor sent an email to others saying the claimant was checking his email on April 22, 2015, and he could not get the claimant's attention. The supervisor told the claimant to leave the cell phone alone and not to use it. The claimant was not sent a copy of the email the supervisor sent. The claimant followed instructions and did not use his cell phone except in an emergency.

After the performance improvement plan expired the employer was not happy with claimant's performance but did not issue the claimant any warnings. The claimant came in early and stayed late. He performed to the best of his ability. On May 22, 2015, the employer issued the claimant a written termination effective July 21, 2015, for many performance issues and for using his cell phone.

On June 4, 2015, the claimant received a text from his father. His father was caring for the claimant's kindergarten age son. His father's text said, "All lights are out. Is there a problem?" The claimant responded, "All lights are out in North Liberty". His father sent a text, "OK". The employer terminated the claimant on June 5, 2015, for sending that text. The employer considered this text to have been an emergency type of text.

The claimant filed for unemployment insurance benefits with an effective date of May 31, 2015. The employer participated personally at the fact-finding interview on June 29, 2015, by Katie Barry.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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.
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> 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).

Iowa Admin. Code r. 871-24.32(8) provides:

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

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The employer first told the claimant he was terminated on May 22, 2015, but his last day would be July 21, 2015. The last incident provided by the employer prior to his notification occurred on April 22, 2015. The employer told the claimant he would not be discharged until July 21, 2015. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge indicated for July 21, 2015.

The next time the employer indicated the claimant would be discharged was on June 5, 2015. An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as the employer had not previously warned the claimant that the use of his cell phone could result in his termination, it has not met the burden of proof to establish that claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. In this case, the handbook states one thing. The accounting supervisor admits telling the claimant he could use his cell phone to text during work time for emergencies. This instruction contradicts the handbook. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's June 30, 2015, decision (reference 02) is affirmed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs