

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

BEAU M ROBERTS
Claimant

GCC ALLIANCE CONCRETE INC
Employer

APPEAL 15A-UI-12507-JCT
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 11/30/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 6, 2015, (reference 03) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on December 1, 2015. The claimant participated personally. Terry Henderson appeared in response to subpoena requested by the claimant. Although properly notified for the hearing, the employer did not furnish a phone number for itself or representative to participate.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full time as a ready-mix truck driver and was separated from employment on September 30, 2015, when he was discharged.

On September 28, 2015, the claimant requested to leave early, at 2:00 p.m. on September 30, 2015, to pick his five-year-old son, Kyle Michael, up from school, as his mother was going to be at an out of town doctor's appointment during the time. The request was verbally approved by the claimant's manager, Dale Smith.

Around 1:45 p.m., Mr. Henderson, who was a peer to the claimant, and also the godfather to the claimant's son, learned from Mr. Smith that the claimant was not going to be permitted to leave at 2:00 p.m. Mr. Smith told Mr. Henderson that if the claimant left, he would be fired because he had already nine discipline points, and leaving without permission would cause him to exceed the allowed ten points. When the claimant was told by Mr. Henderson, he became upset, and raised his voice, saying "screw this place" and he had been granted permission. The claimant did not confront Mr. Smith, or use profanity, threats or talk to anyone else besides Mr. Henderson. In response to the denial, Mr. Henderson determined it was best if he (Mr. Henderson) leave and pick up Kyle Michael, and take the three point disciplinary points, because he had zero. The claimant did not leave on September 30, 2015, to pick up his son,

but was later discharged and told it because he had gotten angry at the workplace. The claimant also learned he had one prior discipline point and not nine points as relayed to Mr. Henderson.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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 Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

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.*

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 the employer has failed to establish the claimant was discharged for disqualifying job-related misconduct. 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). In this case, the claimant was granted permission by Mr. Smith to pick up his child from school and then informed he could not go, just before he was going to leave. The son's mother was at a doctor's appointment and unavailable. It is understandable that the claimant would be upset based on the prior permission granted and the stress associated with his son being left unattended.

No evidence was presented that the claimant used profanity, violent, or abusive language when he told his peer, Mr. Henderson, "screw this place", or displayed conduct so egregious that it would warrant immediate discharge. The employer did not attend the hearing and did not rebut the claimant's credible testimony. Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. The employer has not established a final act of misconduct, and, without such, the history of any other incidents need not be examined. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. Accordingly, benefits are allowed.

DECISION:

The November 6, 2015, (reference 03) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

jlc/css