

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MORRIS A NUNN

Claimant

APPEAL NO. 10A-UI-15791-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEST LIBERTY FOODS LLC

Employer

OC: 08/01/10

Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated November 3, 2010, reference 02, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on December 29, 2010. The claimant participated. The employer participated by Maria Bozaan, human resources manager. The record consists of the testimony of Maria Bozaan and the testimony of Morris Nunn.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a food manufacturing facility located in West Liberty, Iowa. The claimant was hired as a production worker on January 11, 2010. Three or four months later, he was promoted to the position of team leader.

On July 22, 2010, the employer received a complaint that the claimant had threatened another employee. The claimant was placed on suspension by the employer. The claimant was instructed that an investigation would be conducted because the allegations were serious. The claimant was also told that the investigation was confidential and that he was not to discuss it with anyone. The claimant was escorted out of the plant by one of his supervisors. The claimant asked the supervisor if he could tell people that he was on suspension and under investigation. The supervisor told the claimant he could give out that limited information if asked.

The claimant called the employer on July 30, 2010, to ask if he could come to the plant and pick up his paycheck. The claimant was informed that he could do that. When the claimant arrived at the plant, his check was not ready and he had to wait in the front office area for approximately 20 minutes. Several individuals approached him and told him that they heard he had been fired. The claimant responded that he had not been fired, that he was under suspension and investigation, and that he could not discuss it further.

A security guard also asked the claimant what was going on and he gave her the same information. She, in turn, reported to the employer what the claimant said. The employer considered the claimant's comments to be non-cooperation with the investigation. The claimant was terminated on August 2, 2010, for both the threatening comments and the statements he made on July 30, 2010.

None of the individuals who reported the threats made by the claimant testified at the hearing. None of the individuals, including the security guard, testified about the claimant's comments on July 30, 2010. The employer has a policy of not asking employees to testify in order to protect them.

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The employer has the burden of proof to show misconduct.

The claimant was terminated because the employer believed it had credible evidence that the claimant had threatened other workers and that he failed to cooperate in the subsequent investigation. The claimant denied that he ever threatened anyone. He admitted that he did tell people who asked that he was suspended and under investigation and that he could not discuss it further. He had been told by his supervisor that it was permissible to give that information to other individuals.

The employer provided no direct testimony to show that the claimant made threatening statements or that he said anything other than what he had been told he could say about his employment status. The employer's evidence was hearsay only. Ms. Bozaan said that some of the employees who had corroborated the initial complaint about threats and who heard the claimant discussing the investigation were still employed by the employer. She also stated that the employer did not ask these individuals to testify at the hearing in order to protect them.

Iowa law is clear that a finding of misconduct cannot be made on the basis of hearsay testimony, particularly when the claimant does testify and denies the facts upon which the employer has relied to terminate the claimant. Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code section 17A.14(1). Allegations of misconduct 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 Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In Schmitz v. Iowa Department of Human Services, 461 N.W.2d 603, 607-608 (Iowa App. 1990), the Court required evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test, requiring agencies to employ a "common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better evidence; (4) the need for precision; (5) the administrative policy to be fulfilled." Id. At 608.

The administrative law judge could not question the individuals who provided the information to the employer on the claimant's alleged misconduct and assess the credibility of their testimony. The claimant denied the employer's allegations of misconduct. The administrative law judge concludes that the employer failed to provide sufficient evidence upon which to base a finding of misconduct. Benefits are therefore allowed if the claimant is otherwise eligible.

DECISION:

The representative's decision dated November 3, 2010, reference 02, is reversed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw