

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JANE M ECKERMAN

Claimant

APPEAL NO. 13A-UI-11260-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 09/08/13

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 September 27, 2013, reference 01, which held that the claimant was ineligible for unemployment insurance benefits. After due notice, a hearing was held on October 30, 2013, by telephone conference call. The claimant participated personally. The claimant was represented by Dennis McElwain, Attorney at Law. The employer participated by Monica Vonseggern, Area Supervisor. The record consists of the testimony of Monica Vonseggern; the testimony of Jane Eckerman; and Employer's Exhibits 1-10.

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 convenience store chain. The claimant worked at one of the stores located in Sioux City, Iowa. The claimant was hired on July 26, 2011, as a full-time store manager. Her last day of work was September 9, 2013. She was terminated on September 9, 2013.

The incident that led to the claimant's termination occurred on September 4, 2013. The claimant was having a light hearted conversation with one of the employees. Her name was Micheala. The claimant patted Michaela on the cheek. Michaela was shocked at first but the conversation continued in a joking manner. Michaela reported the incident to management and Monica Vonseggern, the area supervisor, reviewed the surveillance tape. She concluded that Michaela had been slapped. The employer has a zero-tolerance policy for harassment in the workplace.

The video surveillance tape was not presented into evidence. Michaela did not testify at the hearing.

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 disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The legal definition of misconduct excludes errors of judgment or discretion in isolated instances. The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. There is insufficient evidence in this record for the administrative law judge to find misconduct on the part of the claimant. The claimant credibly testified that all she did was to pat Michaela on the cheek. This act on the claimant's part was probably poor judgment, given Michaela's reaction. There is no evidence that the claimant had been warned or disciplined in the past for this type of conduct. Of critical importance is that the employer did not provide a copy of the surveillance tape or the testimony of Michaela. Ms. Vonseggern stated that she had a copy and had witness statements. These were not offered into evidence. Michaela still works for the employer but her sworn testimony was also not provided by the employer. The administrative law judge had no first hand evidence from the employer on what exactly occurred on September 4, 2013.

The employer's evidence is essentially hearsay evidence. While hearsay is allowed in administrative hearings, it has limited value in proving misconduct. 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 Sec. 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.

Because the employer failed to provide any first hand evidence of misconduct, the employer has failed to sustain its burden of proof on misconduct. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated September 27, 2013, reference 01, is reversed. Unemployment insurance benefits are allowed, if the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css