IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DANIEL D CONWAY
Claimant

SLB OF IOWA LC
Employer

APPEAL NO. 13A-UI-07112-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/19/13
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the June 11, 2013, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 22, 2013. Claimant participated with his mother Sharon Nosek and stepfather Gary Nosek, who represented him. Employer participated through human resources generalist Tom Reavis and district supervisor Ken Matlack. Employer's Exhibits 1 and 3 were received. The administrative law judge took notice of the administrative record.

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: Claimant was employed full-time as a customer service associate from June 24, 2000 and was separated from employment on April 26, 2013. He was discharged because manager on duty Raymond Bolinger believed the coffee in the dining room was beyond its expiration date and the dining room was not cleaned before claimant went on break. Bolinger did not participate in the hearing. Claimant recalled that all duties were complete before he took his break. Claimant is intellectually disabled and cannot read so was unable to read the written warning on February 7, 2013 about brew times for coffees. All other warnings were for other issues, primarily attendance. There was no documentation of verbal warnings or details. Claimant was hired through Linn County Options, a county agency that obtains sheltered employment for intellectually disabled individuals. His parents credibly testified that claimant does what he is told but is not self-directed. The most recent management group did not spend as much time coaching him and took more of a hard line about job performance rather than helping him. The employer reduced his hours for two weeks in September 2012 for job performance issues and assistant manager Heath Hemmer told a customer he hoped claimant would quit. His hours were restored after customers protested the action.

REASONING AND CONCLUSIONS OF LAW:

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

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 proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445,

448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986).

The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Mindful of the ruling in *Crosser*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand witnesses, the administrative law judge concludes that the claimant's testimony is credible.
Since the employer argued claimant had multiple verbal warnings about job performance in addition to the single written warning, which claimant was unable to read, claimant's hours were reduced in September 2012 for performance issues in an attempt to get him to quit, and claimant was hired through a sheltered employment program for those with intellectual disabilities, the record supports a conclusion that claimant was unable to perform his job duties to employer's satisfaction but did attempt to perform the job to the best of his ability. Accordingly, no intentional misconduct has been established, as is the employer's burden of proof. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). No disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The June 11, 2013 (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs