IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

WARREN L DAVIS
Claimant

WELLMAN DYNAMICS INC
Employer

APPEAL NO. 08A-UI-07552-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/27/08 R: 03
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Warren Davis (claimant) appealed a representative's August 18, 2008 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Wellman Dynamics (employer) for conduct not in the best interest of the employer. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 4, 2008. The claimant participated personally. The employer was represented by John Wilson, Account Representative, and participated by Doug Walter, Human Resources Manager. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

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 re-hired on May 21, 2007, as a full-time x-ray shooter. The employer had terminated the claimant previously for horseplay issues. After the claimant was re-hired he was determined not to engage in horseplay again. During the claimant's second period of employment the employer issued the claimant warnings on March 29, May 12 and June 27, 2008, for attendance issues.

On July 23, 2008, the claimant was working with a male and female coworker. The male co-worker asked the newly hired female to get him some film. This was part of her job duties. The female smiled and said she was busy and she knew the male knew how to get it himself. The claimant said, "If you don't do your job doesn't that make you worthless." The female got the film. Later she told the employer that she felt the workplace was hostile because the claimant called her "a worthless piece of shit." The female said the claimant touched her new tattoo. The female said the claimant threw tape balls and pennies at her. When she told him to stop, the claimant said "fuck you."

The employer met with the claimant and the claimant denied the female's allegations. The employer terminated the claimant on July 28, 2008.

REASONING AND CONCLUSIONS OF LAW:

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

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 Department of Job Service, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony or written statements but chose not to do so. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye-witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's August 18, 2008 decision (reference 01) is reversed. 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/css