

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

ITALY DENWIDDIE

Claimant

APPEAL NO. 18A-UI-06840-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABCM CORPORATION

Employer

OC: 06/03/18

Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Italy Denwiddie (claimant) appealed a representative's June 21, 2018, decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits after her separation from employment with ABCM Corporation (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 12, 2018. The claimant participated personally. The employer participated by Regina Haley, Human Resources Coordinator; Cerrie Thomas, Assistant Director of Nursing; Olivia Guerrero, Administrator; Lauren Parcher, Certified Nursing Assistant/Certified Medication Aid; Kimberley Hormann, Certified Nursing Assistant/Certified Medication Assistant; Monica Roath, Certification Nursing Assistant; and Samantha Humburg, Certified Nurse Aid. The employer offered and Exhibit 1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

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 hired on May 20, 2016, as a full-time certified nursing assistant. She signed for receipt of the employer's handbook on May 20, 2016. The employer did not issue the claimant any warnings during her employment. On September 28, 2016, the claimant signed a document stating she understood she was not to carry her cell phone during work hours and that taking pictures in the facility was prohibited. All workers carried their cell phones at work. Reporting a co-worker for breaking a rule is not considered harassment or retaliation by the employer.

The claimant took a selfie in a soiled utility room. On June 3, 2018, Courtney Thraen, a nurse, told the employer that the claimant took the picture in a resident's room. On June 4, 2018, the employer talked to the claimant about the picture. After the claimant left the meeting with the employer and before work, she went to the break room and ranted about the meeting. She was angry and thought Monica Roath reported her to the employer. Ms. Roath and others heard the

claimant explain the circumstances of the meeting. The claimant wanted to know who reported her so she could stay away from that person.

Later, the claimant went back to the break room and talked with co-workers, Samantha Humburg, another Samantha, Kimberly Hormann, Courtney Thraen, Dakota (last name unknown - LNU), and Cheyene LNU. The claimant told them she got in trouble when someone lied about her taking a picture. She told the group she believed Ms. Roath reported her because she was a recent addition to her Facebook friends and the picture was posted on Facebook. The claimant called Ms. Roath a "bitch" and said "she's lucky I'm not the person I used to be". The claimant talked about having her friend contact Ms. Roath's boyfriend, Blake, to cause problems in the relationship. Blake LNU also worked for the employer.

At 9:45 p.m. on June 4, 2018, the claimant discovered that Courtney Thraen was the person who reported her to the employer. The claimant was shocked because Ms. Thraen used her cell phone every day at work. The claimant called Ms. Roath on the walkie-talkie and asked her to meet in the shower room. Ms. Roath met the claimant immediately and the claimant told her that Ms. Thraen was the person who reported her to the employer. The claimant apologized to Ms. Roath. Ms. Hormann and Dakota LNU came in later and were told the information.

Later, Ms. Thraen approached the claimant and said she did not tell on the claimant. The claimant said "That's not what I heard". Ms. Hormann, Ms. Roath, Dakota LNU, and another co-worker heard the conversation.

On June 5, 2018, the claimant told the employer about Ms. Thraen's inconsistencies with the location of the picture and Ms. Thraen's daily use of her cell phone. The employer told the claimant it wanted her statement and would take it soon. On June 5, 2018, Ms. Thraen wrote a statement of complaint about the claimant.

Courtney Thraen wrote in her statement that she used her phone at work to talk to her mom. Her statement read, "Italy would say things like 'I'm going to be petty and turn her in for everything she does wrong and I'll find a white friend of mine to take her boyfriend from her. And that if she ever sees her outside of work in Mason that she better run.'" Ms. Thraen's statement goes on to say, "When I passed Italy in the hall I told her, 'I did not tell on you' Italy said, 'that's not what I heard along with other things that you said'. I walked away then when I came back I overheard Italy say that she is going to hurt me."

Next on June 5, 2018, the employer took the written statements of Samantha Humburg, Kimberley Hormann, and Lauren Parcher. Samantha Humburg wrote in her statement that the claimant said "Monica was lucky she doesn't see her outside of work" and "she was going to watch Monica to try to find anything to turn her in for it". Ms. Roath was not present when the statement was made.

Kimberley Hormann's statement talked about the claimant complaining about her situation and how it must be Ms. Roath who told on her to the employer. The statement did not mention any threat by the claimant on Ms. Thraen.

Lauren Parcher wrote in her statement that the claimant said, "better not see her outside of work". The statement was made about Ms. Roath. Ms. Roath was not present when the statement was made. Ms. Parcher did not think this statement was out of the ordinary in her work environment because her co-workers gossiped a lot.

On June 6, 2018, the employer asked the claimant to come in for a meeting. The employer did not ask the claimant for any information or a statement before the termination. The employer terminated the claimant for confronting a co-worker on June 4, 2018, and threatening the co-worker with physical injury. On June 8, 2018, Ms. Roath gave the employer her statement.

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, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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). The employer's termination notice indicates the claimant was terminated because she confronted a co-worker and threatened them with physical injury. There appears to be two co-workers the employer is alleging were threatened in this case: Ms. Thraen and Ms. Roath.

In the first instance, the employer is relying on Ms. Thraen's written statement. She did not appear at the appeal hearing and could not be questioned about her statement. 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 but chose to provide a written statement. The statement does not carry as much weight as live testimony because the testimony is under oath and the witness can be questioned.

There were six witnesses to this exchange between the claimant and Ms. Thraen. The claimant denies threatening Ms. Thraen. Ms. Hormann did not hear a threat to Ms. Thraen. Ms. Roath's statement was not taken until June 8, 2018, and could not be considered part of the termination. Even so, her statement does not mention a threat to Ms. Thraen. The employer did not provide the statements of Dakota LNU or the other co-worker. Only Ms. Thraen's statement indicates a threat from the claimant and the employer did not provide her first-hand testimony. Therefore, it did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct in this instance.

In the case of Ms. Roath, it is clear from the testimony and statements of all witnesses that the claimant never directly confronted or threatened her with physical injury. Ms. Roath was not afraid of the claimant because she did not hesitate to meet her alone in the shower room to talk. The claimant was upset and talked about the injustice of a co-worker who breaks the rules and turns in a colleague for the very rules the co-worker offends. The co-workers appeared to gossip about events throughout the shift but never reported any concerns to a supervisor until Ms. Thraen turned in her report. No supervisor issued the claimant any reprimand to the claimant at any time during the claimant's shift on June 4, 2018.

The claimant may have shown poor judgment when she made statements about Ms. Roath but the statements were isolated to one day. The employer did not provide sufficient evidence to show that this one incident rose to the level of misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's June 21, 2018, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs