

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MICHAEL C THORNTON
Claimant

ON POINT SECURITY GROUP LLC
Employer

APPEAL 15A-UI-07437-SC

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/07/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 19, 2015, (reference 01) unemployment insurance decision that denied benefits based upon the determination he was discharged for misconduct that was not in the best interest of the employer. The parties were properly notified about the hearing. A hearing was held on August 25, 2015 at 1000 E. Grand Ave in Des Moines, Iowa. Claimant Michael Thornton participated through Attorney Joseph Ferrentino. Employer On Point Security Group, LLC participated through Chief Operating Officer Howard Johnston. Witness Melvin Beard also participated in the hearing.

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: The claimant was employed full-time as a civilian Sergeant/Security Officer at Camp Dodge beginning most recently in February 2014, and was separated from employment on June 6, 2015, when he was discharged. The claimant was second in command for the employer at Camp Dodge and he reported to civilian Lieutenant Melvin Beard. Beard reported to civilian Colonel/Chief Operating Officer Howard Johnston. The employer requires its employees to wear a uniform which can include a name tape which is black with gold lettering, an American flag pin which initially signified the employee was a veteran of the armed services or a police officer, a pin designating the employee as trained in high risk situations (HRT), and an eight-point hat.

In July 2014, the claimant attended training and his name tape was destroyed. He had in his possession a camouflage name tape with his name written in black writing. The claimant used this name tape as he had been told by officers at Camp Dodge that he needed to have his name identified on his uniform. Beard liked the way the claimant's name tape looked on the uniforms and asked Howard for permission to alter the name tape utilized by the employees at Camp Dodge. Howard denied the authorization and Beard communicated this to the claimant.

Over the next several months, at least twice a month, Beard suggested the claimant remove the name tape.

For one day in March or April of 2015, the claimant and Beard experimented with berets in lieu of the eight-point hat. The claimant decided to wear his beret for another three weeks, during which time Beard reminded the claimant that the berets had not been authorized. Beard began to receive complaints from three of the Colonels at Camp Dodge and then ordered the claimant to remove the beret. The claimant removed the beret at that time.

In early May 2015, Howard wanted all HRT pins returned as he was reexamining the qualifications needed to be HRT certified. The claimant and two other individuals did not return their pins as the employer had not furnished these pins. The two employees discontinued wearing the pins; however, the claimant continued to wear his even after Beard reminded him that they were not authorized at that time.

The biggest uniform issue was centered on the claimant's insistence that he wear the American flag pin even though he was not a veteran. His family has a generational history of serving in the armed forces and the claimant would have served except he was deemed not qualified due to a medical issue. Beard asked the claimant why he was wearing the American flag pin and he stated it was to honor the veterans who did serve. He further explained he was showing his patriotism.

Approximately one week before his termination, the claimant was involved in an altercation with JK, another employee. JK arrived late to work as the claimant was leaving. The claimant, whose job was to supervise JK and other employees, informed JK that he would need to make up his time. The claimant and JK got into an argument and JK reached out to remove the American flag pin from the claimant's uniform. A physical altercation ensued. As a result of this incident, Howard changed the dress code allowing all employees to wear the American flag pin and decided he would find another pin to signify veteran status or law enforcement.

On June 5, 2015, Beard told the claimant he was being demoted to a corporal for stolen valor and he should not wear his sergeant stripes the following day. It was conveyed to the claimant that the Officers at Camp Dodge were conducting or could conduct an investigation into the claimant's conduct for violations of the Stolen Valor Act of 2005, a federal law passed to prevent civilians from impersonating military personnel for monetary gain. The claimant was told that other employees had reported he was claiming to have served in the military when he had not. The claimant denied he engaged in the alleged misconduct and said he would wear the stripes appropriate for his rank. Beard conveyed the claimant's response to Howard who then terminated the claimant's employment for uniform infractions and stolen valor.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 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.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

- (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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.

The employer has identified two reasons for the claimant's termination: uniform infractions and stolen valor. With regard to the uniform infractions, Beard testified he made suggestions to the claimant to remove parts of the uniform but did not give him an order to remove the items on his uniform. The claimant did remove the items once he was given a direct order. The claimant was never given a written warning or put on notice that continued violations of the uniform policy would result in termination. On the contrary, the claimant had been violating parts of the uniform guidelines throughout his entire employment with no repercussions. The employer has not met its burden to show the claimant engaged in disqualifying job-related misconduct.

The stolen valor allegation could be considered misconduct. The claimant credibly testified that he never held himself out to be a service person or veteran. Beard denied that he ever heard the claimant make that claim or anything similar. Howard claims he received statements from five individuals who heard the claimant make these statements. He did not provide these statements prior to the hearing nor did he have them at the hearing. Howard did not hear the claimant hold himself out to be a service person or veteran.

When the record is composed of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. 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).

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present witnesses with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the individuals were offered. Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. The employer has not met its burden to show that the claimant engaged in disqualifying job-related misconduct in connection with any stolen valor.

DECISION:

The June 19, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/pjs