

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CANDACE ELLIS

Claimant

APPEAL NO. 13A-UI-05800-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

APAC CUSTOMER SERVICES INC

Employer

OC: 04/14/13

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 May 13, 2013, reference 03, which held that the claimant was not eligible for unemployment insurance benefits. After due notice, a hearing was held on August 7, 2013, in Davenport, Iowa. The claimant participated personally. Katrina Castle was a witness for the claimant. The employer participated by Turkessa Newsone, Human Resources Generalist. The record consists of the testimony of Turkessa Newsone; the testimony of Candace Ellis; the testimony of Katrina Castle; and Employer's Exhibits 1-23.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and considered all of the evidence in the record, finds:

The employer is a call center located in Davenport, Iowa. The claimant was hired on August 16, 2012. Initially she was a full-time employee but later became part time when she became a student. The claimant was a customer service representative. Her last day of work was April 16, 2013. She was terminated on April 18, 2013.

The series of events that led to the claimant's termination began on April 16, 2013. The claimant and another employee named Ebony Dowell Davis got into a verbal altercation concerning a mutual friend, acquaintance and co -worker named Katrina Castle. The argument took place on the call floor. Ms. Davis and the claimant were separated as both had stood up and both were sent home.

The claimant returned to work on April 18, 2013. Human resources had not yet started an investigation of the incident on April 16, 2013. Katrina Castle, who is a friend of the claimant, arrived at work and she and the claimant had a private conversation in the hall. Ms. Castle said

the conversation concerned her personal issues and she admitted she used a few "cuss words." She and the claimant did not have an argument.

The employer did conduct an investigation and concluded that there had been a "threat of violence" on April 16, 2013. None of the witnesses who gave statements to the employer actually testified at the hearing. The claimant denied that she ever made any threat of violence. The employer has a zero tolerance for threats of violence made in the workplace.

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 leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. The claimant credibly testified that she and Katrina Castle did not have an argument on April 18, 2013. As for the April 16, 2013 incident, the claimant admitted she stood up after Ebony Dowell Davis made some comments about being talked about behind her back. The greater weight of the sworn testimony is that there were no threats of violence made by the claimant. The employer's evidence to the contrary is hearsay. Hearsay evidence is admissible into evidence in

unemployment insurance cases. It has limited value in proving misconduct when there is sworn testimony to the contrary.

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.

In this case, the individuals who gave statements to the employer did not appear for the hearing. As a result, the administrative law judge did not have the ability to question these individuals and weigh their testimony against the sworn testimony of the claimant and Ms. Castle. There is not enough evidence in this record to show that the claimant threatened anyone with violence. The claimant used extremely poor judgment when she got into a loud conversation with Ms. Davis. A single instance of poor judgment is not misconduct. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated May 13, 2013, reference 03, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css