IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

GEORGE DEATSCH
Claimant

CITY OF IOWA CITY
Employer

APPEAL NO: 12A-UI-14741-BT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/18/12
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

George Deatsch (claimant) appealed an unemployment insurance decision dated December 12, 2012, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from the City of Iowa City (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 20, 2013. The claimant participated in the hearing with wife, Teresa, in attendance and he was represented by Attorney Thomas Hobart. Former co-employee Chris Tang participated on behalf of the claimant. The employer participated through Karen Jennings, Human Resources Administrator; Mike Moran, Parks and Rec Director; and City Attorney Sarah Holecek. Employer's Exhibits One through Eight and Claimant's Exhibits A through F were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

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 full-time on March 25, 1991 and was working as the cemetery supervisor at the time of his separation on November 19, 2012. The employer discharged him after an investigation revealed he violated company policy by repeatedly failing in his duties as a supervisor and by creating a hostile work environment. The claimant was suspended for three days in May 2009 for failure "to properly supervise staff and set standards of conduct necessary to create a productive, positive, healthy work environment." In June 2010, Parks and Recreation Director Mike Moran issued the claimant a written directive to cease inappropriate interactions with a member of the public after he ignored a verbal directive to do

the same. In that written memo, Mr. Moran expressed his disappointment in the claimant's behavior as a supervisor "responsible for staff management, work assignments, morale, leadership, and other numerous responsibilities" and reminded him that he needed to be able to trust the claimant's judgment.

Personnel policies state that "Harassing behavior of any nature has the effect of creating a hostile or offensive work environment." Additionally, "All employees have an affirmative duty to prevent harassment and discrimination in the workplace by producing an environment that exposes and discourages harassment or discrimination of any kind." The policies state that, "any employee who engages in prohibited conduct will be subject to disciplinary action up to and including discharge" and that "abusive or improper treatment of co-workers during the performance of duty is a cause for discipline up to and including termination of employment."

On November 9, 2012, Todd McInville filed a complaint of inappropriate treatment by the claimant and the complaint detailed incidents which had occurred over the previous three years. The employer began an investigation which revealed the claimant had a pattern of inappropriate behavior that included intimidation of subordinates, derogatory name calling of subordinates and a lack of leadership, which led to a serious deterioration of the work environment.

The complaint included an incident during which the claimant stood behind Mr. McInville and buckled his knees and in another incident, he participated in horseplay during which he encouraged another employee to throw a sponge at Mr. McInville. The claimant involved other staff members and created a scenario to test how quickly Mr. McInville would report an equipment incident and after it was reported, the claimant disciplined Mr. McInville. The most significant issue was the fact that the claimant repeatedly referred to Mr. McInville as "Re-Todd" even after he was requested by Mr. McInville to stop. The claimant admitted the term could be "equated" to retard and said it was based upon Mr. McInville repeatedly locking his keys in the car and using a coat hanger to open the door. The claimant prepared a sign which said "Re-Todd's spare key" and attached it to a coat hanger. The cemetery staff reported that the claimant generally used the derogatory name when Mr. McInville had done something wrong. He continued using this nickname until May 25, 2012 when he called Mr. McInville this name twice over the cemetery public address system and Mr. McInville angrily confronted him.

The claimant thoroughly documented the incident from this date and two subsequent dates. He wrote that Mr. McInville "approached me from behind ranting that he is tired of me harassing him. I told him that he needed to settle down and if he would like to bring up the issue it should be done in private. He kept going so I repeated myself and added that we would discuss it later." The claimant told Mr. McInville to meet him in the break room and he wrote, "Once in there I asked him if he wanted to find himself a new job. I told him that I was not going to tolerate that type of actions (sic). I offered my apology to him if I had offended him and explained that it wasn't anything personal; it was just simple joking/ribbing."

The claimant felt Mr. McInville acted inappropriately by addressing the matter with him in front of co-employees. So, after discussing the matter with Park and Rec Director Mike Moran, the claimant issued Mr. McInville a verbal warning on May 29, 2012 and he documented the talk by writing, "I again offered my apology if he took thing (sic) too personally and explained that this was at least the 3 (sic) time he has acted out in this manner and that it would not be tolerated any longer."

The final date that was documented by the claimant was May 30, 2012 on which a conversation was reported to have occurred between Mr. McInville and his co-employees. Mr. McInville talked to his co-workers and "stated that he felt like I was singling him out and that when Bob

gives me a hard time that it opens the door for the seasonal employees to do the same. They said NO when you joke, rib and prank us, that gives us the right to return the favor not Bob. Todd 'well I don't call anybody name though' Tony 'you call me Hillbilly Boy and stuff like that' Chris 'who gave Dave Tharp the nickname RD (Racist Dave) Todd didn't have a response." The claimant never explained who provided this information to him and/or why he documented it.

The claimant denies calling Mr. McInville this nickname after May 2012 but the work environment seemed to steadily deteriorate after that. Mr. McInville was left with the impression that his employment would be terminated in his upcoming evaluation scheduled for February 2013. The claimant advised him that he was not the person for the job and it became general knowledge within the cemetery staff that Mr. McInville's employment was in jeopardy. The claimant maintained a list of issues regarding Mr. McInville's unacceptable work performance and all but two of these were dated after May 2012. Mr. McInville was aware of the list and repeatedly asked the claimant to go over the list with him so that Mr. McInville could address the concerns but the claimant refused and said that he would only discuss issues from prior evaluations and would discuss ongoing issues during the upcoming evaluation.

The work condition had become so uncomfortable for Mr. McInville that he took his meal breaks in his vehicle instead of the break room with the rest of the staff. One employee noted that the work environment was so uncomfortable for Mr. McInville that "You can see it on his face every morning." When the employer investigated the matter, the claimant was asked whether he would extend an olive branch to Mr. McInville and ask him to come into the break room with the other employees. The claimant admitted he could but said he would not do so. When questioned about this during the hearing, the claimant testified that he was never asked to do that. He did testify that he did everything he could to resolve things but felt like Mr. McInville needed to get counseling due to the way he reacted to things. The employer witness testified that when the claimant was walking out after his discharge, he said to Mr. McInville, "I should have fired you three years ago."

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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.
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> 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 to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on November 19, 2012 for creating a hostile work environment. He violated personnel policies in his direct treatment of Mr. McInville and he failed in his affirmative responsibility as the division supervisor to produce an environment that discourages harassment of any kind. The claimant failed to acknowledge the derogatory nature of the term "Re-Todd", he failed to acknowledge his role in creating the negative work environment and failed to offer an affirmative solution for the problem.

The claimant thinks his termination was unjust and believes it was Mr. McInville's inappropriate reactions as opposed to anything he did wrong. He admits that "Re-Todd" was another name for "retard" but contends that Mr. McInville never objected to the term until May 2012. While the administrative law judge finds that claim extremely unlikely, the claimant's own documentation suggests otherwise since he wrote Mr. McInville was "ranting that he is tired of me harassing him" and how Mr. McInville felt like he was being singled out. The manner in which the claimant documented the incident is further evidence of the fact that he appeared to be building a case to discharge Mr. McInville. While it is common to document an incident that leads to a verbal warning, it is unusual and somewhat odd that the claimant documented two conversations between co-employees, in which he did not take part. Additionally, the claimant's list of Mr. McInville's performance issues is also suspect in the fact that most of the problems are dated after May 25, 2012.

The claimant's treatment of his subordinate shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated December 12, 2012, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Susan D. Ackerman
Administrative Law Judge

_____
Decision Dated and Mailed

sda/pjs