IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

GILSBERT D OLSON
Claimant

MCANINCH CORP
Employer

APPEAL NO. 09A-UI-16276-VST

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/27/09
Claimant: Respondent (1)

Section 96.5-2-a - Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated October 23, 2009, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on December 3, 2009. Claimant participated. Employer participated by Dave Stitz, vice president of finance. The record consists of the testimony of Dave Stitz; the testimony of Gilsbert Olson; and the testimony of Gail Mader.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The employer in this case is a construction company that does excavation work for utilities and grading of roads and highways. The employer uses union labor and there are collective bargaining agreements between the employer and the unions that provide workers to the company. The claimant was a foreman on a utility crew working on a project in Fort Leonard Wood, Missouri. One of the claimant's responsibilities was to report the hours for the members of his crew. According to the union contract, the starting time was to be 6:30 a.m. with one half hour unpaid lunch.

The events that led to the claimant's termination occurred on September 17, 2009. The company president, Doug McAninch, informed Dave Stitz, vice president for finance, that he had been on the job site and could not find the claimant's crew when he looked for them at 3:30 p.m. He also saw that the crew's equipment was shut down and not being used. Mr. Stitz conducted an investigation and determined that the claimant had falsified his own hours and the hours of his crew. The claimant reported that he worked 11 hours on September 17, 2009, whereas Mr. Stitz could only verify that the claimant worked 8.5 hours. Similar discrepancies were found on the time cards of the other employees.

One of those employees, Gail Mader, started work at 6:00 a.m. and left at 3:40 p.m. since he had a long drive back home. He reported 10 hours of work.

The employer annually held a meeting where it was emphasized that if an employee was "cheating the time" that this would lead to disciplinary action, up to and including termination. The employer terminated the claimant since the claimant had not only misrepresented his own time card, but the time cards of other members of the crew.

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 duty a worker owes to the employer. One of the most basic duties an employee owes his or her employer is truthfulness. An employer can reasonably expect that an employee will work the hours assigned and not inflate hours in order to leave early and get pay to which the worker was not entitled. The employer has the burden of proof to show misconduct.

If the claimant did falsify his timecards and those of his fellow crew members, the employer would have established misconduct. However, the employer's proof falls short of what is needed to establish misconduct. Mr. Stitz did conduct an investigation and spoke to others on the job site, but he did not have independent personal knowledge of what actually occurred and when. Doug McAnnich is the individual who was at the job site and questioned where the

employees were and could not find them, but he did not testify at the hearing. The claimant says that the crew was at the job site. Dan Pohlmeier, the claimant's supervisor, was also present at the site and gave some information to Mr. Stitz. In addition, Mr. Pohlmeier was the person who actually terminated the claimant. He too did not testify at the hearing. As a result, the employer's evidence is essentially hearsay—a recapitulation of what Mr. Stitz found when he investigated the matter at the request of the company president. The claimant denied the allegations and there was no opportunity for the administrative law judge to assess the credibility of the employer's witnesses as they did not testify at the hearing.

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 section 17A.14(1).. Because of the nature of the evidence produced at hearing, the employer is unable to show misconduct.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 requires 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.
The evidence presented by the employer in this case consisted of hearsay reports gathered by Mr. Stitz in the investigation of this matter. The individuals who gave Mr. Stitz the information did not participate in the hearing. There is no indication as to why they could not have participated in the hearing. Accordingly, there is no credible evidence on which to base a finding of misconduct. Benefits will be allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated October 23, 2009, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs