IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DEWAYNE E ROBINSON Claimant **MARRIOTT HOTEL SERVICES INC** Employer	**APPEAL 15A-UI-05610-EC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/05/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant/appellant, Dewayne Robinson, filed an appeal from the May 5, 2015, (reference 02) unemployment insurance decision that denied benefits based upon a discharge for misconduct, specifically, for violation of a known company rule. The parties were properly notified about the hearing. A telephone hearing was held on June 22, 2015. The claimant participated, along with his attorney, Nicholas Shaull. The employer, Marriott Hotel Services Inc., participated through Jacqueline Jones, hearing representative and Kim Compton, HR manager for the Downtown Marriott in Des Moines, Iowa. The employer submitted exhibits which were collectively marked as Exhibit E, and were premarked as E1 – E9. These exhibits were admitted into the record without objection.

ISSUE:

Whether or not the claimant was discharged for misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a steward, dishwasher and then line cook, from January 20, 2015, until this employment ended on March 10, 2015. The last day he worked for this employer was February 26, 2015. He was suspended pending an investigation following an incident with a coworker on the evening of February 26, 2015.

On the evening of February 26, 2015, the claimant and a coworker, James, were both working as line cooks. James is approximately six feet tall and weighs an estimated 300 pounds. The claimant is five feet seven inches tall and weighs 125 pounds.

The claimant was cleaning the floor with a Zamboni machine. This machine does not need additional water in order to properly clean. James told the claimant that he was not cleaning the floor properly because he did not use additional water. James said to the claimant, "I taught you this f***ing job." The claimant called James a "smartass." The claimant bent over by the machine to show James where the water was placed. James pushed the claimant to the ground. James pushed the claimant to the ground a total of three times.

The claimant's supervisor did not witness the incident described above. She walked in after James pushed the claimant to the ground three times. She heard the claimant say, "Let's take it outside." She told the claimant to go outside and take a break. He did so. The supervisor sent the claimant home before the end of his shift. She did not send James home right away. The claimant received medical treatment for his injuries related to this assault.

The employer suspended the claimant and James while it investigated the incident. Both employees were discharged for misconduct, in violation of a company policy. This policy, part of the "Conditions of Employment" at the Marriott, states, in pertinent part: *I further understand that I may be discharged without any prior warning if I commit any of the following acts: 7. Threatening, either open or veiled, verbal or physical, an associate, guest, customer, or vendor. (Exhibit E4)* The claimant was officially discharged from this employment on March 10, 2015.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the 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.
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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.

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(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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.

Iowa Admin. Code r. 871-24.32(9) provides:

> (9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The employer has an interest and duty in protecting the safety of all of its employees. 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.

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment, in reaction to the physical assault by a coworker. The employer had not previously warned the claimant that his word use would result in his termination. Therefore, the employer did not meet the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will not tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing what he or she can or cannot say in order to keep his or her job. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

Training or general notice to staff about a policy is not considered a disciplinary warning, and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits.

It is my duty, as the administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence he or she believes; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Holtz*, 548 N.W.2d 162 at 163.

I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I reviewed the exhibits submitted and admitted into the record. I find the claimant's recollection of events to be credible. His recollection was based on his personal knowledge and experience. The employer representative's testimony was based on information relayed to her by other employees and a supervisor who did not personally witness the entire incident.

Where a claimant participated in a confrontation without attempt to retreat, the Iowa Court of Appeals rejected a self-defense argument stating that to establish such a defense the claimant must show freedom from fault in bringing on the encounter, a necessity to fight back, and an attempt to retreat unless there is no means of escape or that peril would increase by doing so. *Savage v. Emp't Appeal Bd.*, 529 N.W.2d 640 (Iowa Ct. App. 1995).

The difference in opinion on the proper way to clean the floor did not justify the claimant's coworker's actions. The claimant's use of the word "smartass" did not justify his coworker's violent actions. This claimant credibly established that he could not escape the situation, when his coworker pushed him to the ground three times. He did escape the situation by going outside as soon as he had the opportunity to do so.

When the record includes hearsay evidence, the written statements of co-workers who did not participate in the hearing, that evidence must be examined closely in light of the entire record. *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa 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 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).

Mindful of the ruling in *Crosser*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon hearsay statements, the administrative law judge

concludes that the claimant's testimony is credible. The employer has not met its burden of proof. The claimant was not at fault in bringing on the encounter. The undisputed evidence clearly shows that the claimant's coworker pushed him to the ground three times. The claimant did not retaliate or engage in any further physical confrontation. The claimant tried to diffuse the situation. Even if the claimant's word choice violated a company policy, that conduct does not rise to the level of misconduct which would disqualify him from receiving unemployment benefits. The employer has not met its burden of proof to establish a current or final act of disqualifying misconduct. Benefits are allowed.

DECISION:

The May 5, 2015, (reference 02) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

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Emily Gould Chafa
Administrative Law Judge

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Decision Dated and Mailed

ec/css