IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

GARY F SERRANO
Claimant

VON MAUR INC
Employer

APPEAL NO. 15A-UI-04950-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/29/15
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Von Maur (employer) appealed a representative's April 14, 2015, decision (reference 01) that concluded Gary Serrano (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for June 4, 2015. The claimant participated personally. The employer participated by Kayla Seitz, Distribution Center Manager, and Holly Sutton, Assist Distribution Center Manager. Exhibit D-1 was received into evidence. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

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 on July 17, 2008, as a full-time shipping associate. The claimant signed for receipt of the employer's handbook on July 17, 2008, August 27, 2009, and March 30, 2010. The handbook prohibits having a controlled substance on the store premises. The employer did not issue the claimant any warnings during his employment.

The claimant and his co-worker were friends. The claimant stopped by the co-worker's car in the parking lot one day to get money the co-worker owed him and another day to pay him for some enchiladas the co-worker brought to work. The employer noticed the claimant's activities and thought they were suspicious.

On March 27, 2015, the two were parked beside each other in the parking lot and the employer filmed the two. The claimant was seated in his car when the co-worker walked up to the passenger side window with his keys in his hand. The employer thought it looked like a bag of something. The employer thought the co-worker dropped the bag in the claimant's car. The co-worker did not drop anything into the car.

On March 30, 2015, the employer questioned the claimant about the incident. The claimant said something about being out of prescription ibuprofen for his gout and using some of the co-worker's ibuprofen. The co-worker told the employer he gave the claimant marijuana. The claimant denied receiving marijuana from the co-worker. The employer terminated the claimant on March 30, 2015, for having a controlled substance on the store premises. The co-worker was also terminated. Later the co-worker recanted his story.

The claimant filed for unemployment insurance benefits with an effective date of March 29, 2015. The employer participated at the fact-finding interview on April 10, 2015.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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.

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).

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Generally, the burden of proof is on the party asserting the affirmative of an issue in an administrative proceeding; on the party

who would suffer loss if the issue were not established. Wonder life Company v. Liddy, 207 N.W.2d 27 (Iowa 1973); Norland v. Iowa Department of Job Service, 412 N.W.2d 904 (Iowa 1987). The employer has the burden of proof in this case to establish job misconduct. The employer has established the claimant talked to a co-worker in the employer's parking lot through the claimant's open car window. The co-worker had something in his hands that he may or may not have placed in the claimant's car. What the item was and whether it was a controlled substance is unknown. The employer did not produce a statement that it took from the co-worker or the claimant during its investigation of the March 27, 2015. The claimant's and the employer's testimony is inconsistent. The administrative law judge finds the claimant's testimony to be more credible because he was an eye witnesses to the events for which he was terminated. While the employer did provide circumstantial evidence, it did not provide sufficient evidence of job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's April 14, 2015, decision (reference 01) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/css