

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ERIK J HAYEK
Claimant

APPEAL NO. 18A-UI-06284-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

TRI CITY ELECTRIC CO OF IOWA
Employer

OC: 05/20/18
Claimant: Appellant (1)

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated June 5, 2018, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on June 22, 2018. Claimant participated personally. Employer participated by Nicole Leyendecker.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on May 21, 2018. Employer discharged claimant on May 21, 2018 because claimant had been physically annoying a coworker.

On May 16, 2018 claimant was sitting near a coworker at a break. Claimant was bothering a coworker by extending out his tape measure and poking the stern coworker in the belly. The coworker told claimant to quit it, and a few minutes later, claimant did it again. The coworker grabbed the tape measure and twisted it in such a way that it would no longer retract.

Later in the afternoon, the claimant came upon the coworker again, and asked the coworker if he wanted the broken tape measure. The coworker refused it, and claimant attempted to toss the tape measure into the cart the coworker was pushing. The tape measure ended up hitting the coworker in the mouth, cutting his lip.

Employer conducted an investigation, and received written witness statements from both people involved in the incident and a third party who was situated nearby. After the investigation, employer chose to terminate claimant.

Claimant stated that he was terminated for horseplay, not a violation of employer's Anti-Harassment policy. Claimant stated that he was told at the separation the he was terminated for throwing the measuring tape.

Employer has an Anti-Harassment policy that claimant received at the time of his hire. Included within that policy was a statement that physical harassment, including unwanted poking of a coworker. (Emp. Ex. 4).

Claimant had previously been warned for violation of employer's attendance policy and for not wearing proper safety glasses.

Employer stated that claimant's action of poking his coworker with an extended tape measure was the final action that led to his termination, but the calculus used to terminate claimant also included his other warnings for the unrelated actions.

Claimant stated that he'd never been warned for harassing coworkers in any way, and had in fact received compliments on his evaluations for his ability to get along with others.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). The conduct must show a 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon supra*; *Henry supra*. In contrast, 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 deemed misconduct within the meaning of the statute. Rule 871 IAC 24.32(1)a; *Huntoon supra*; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

The Iowa Supreme Court has 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). Employer chose not to have the victim of this incident testify, and did not have the person who conducted the investigation testify at the hearing. Thus, the administrative law judge was left to determine the surrounding interplay between the two parties that led to the termination from only the writings of those involved and the testimony of claimant. Claimant admitted that he's repeatedly poked his coworker with the measuring tape, doing it after he was told that it was annoying. This testimony went along with the written statements of both others.

In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning his use of a tape measure to poke another worker in violation of employer's harassment policy. The last incident, which brought about the discharge, constitutes misconduct because claimant continued forth with an action that constitutes violation of the company's anti-harassment policy after he'd been told not to do so. The annoying, harassing act certainly would not have constituted misconduct upon claimant's first time doing it. But claimant couldn't quit after the coworker, in no uncertain terms, asked him to stop. It is not unreasonable for employer to think that the parties would have had ongoing dissension if employer hadn't terminated claimant for his repeated pokings. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated June 5, 2018, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/rvs