

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MALLORY D BRANDENBURG
Claimant

4 PAWS UNLEASHED INC
Employer

APPEAL 15A-UI-13074-JCT
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 10/25/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 17, 2015, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on December 15, 2015. The claimant participated personally. The employer participated through Cori Priebe. Kaitlyn McDaniel also testified for the employer. No documents were offered or admitted into evidence.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a kennel attendant and was separated from employment on October 28, 2015, when she was discharged.

The employer asserted the claimant was discharged for another altercation on October 24, 2015, for stating she wanted to punch a dog in the head, for calling a dog a “n---er”, for being a no call/no show on September 15, 2015, and for lying on her time card on September 25, 2015. The claimant also did not provide adequate coverages for shifts missed October 25, 26 and 27, after calling the employer from the hospital to notify them she had broken her leg.

The employer asserted the claimant would have been discharged for a final altercation with a co-worker named Trish, regardless of the call offs and coverage issue. The final incident occurred on October 24, 2015 when the claimant allegedly cussed at Trish, calling her a bitch, and also stated she wanted to punch a dog named Clive in the head. The claimant denied calling Trish a bitch, and testified it was Trish, not the claimant that referenced punching a dog in the head. Trish did not attend the hearing or offer a written statement in lieu of participation.

The employer had issued the claimant a three-month disciplinary probation on August 21, 2015, in response to a verbal altercation that took place after the claimant became upset over a co-worker's treatment of a dog. The employer asserted the claimant could be discharged for any future incident after the warning. The claimant was then a no call/no show after she missed a shift in error on September 15, 2015 and allegedly falsified a time card on September 25, 2015, but was not fired. The employer also asserted it had received a report of the claimant repeatedly calling a dog a "n---ger" but had no specific dates and did not confront the claimant about it prior to discharge. The claimant denied calling any dog a "n---er."

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.

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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

It is the duty of the administrative law judge as 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 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. *Id.* 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 believable

evidence; 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. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer has failed to meet its burden of proof to establish the claimant was discharged for disqualifying job related misconduct.

The claimant was placed on a three-month disciplinary probation after an altercation with a fellow employee on August 21, 2015, and made aware her job was in jeopardy. The employer asserted the claimant was discharged for another altercation on October 24, 2015, for stating she wanted to punch a dog in the head, for calling a dog a “n---er”, for being a no call/no show on September 15, 2015 and for lying on her time card on September 25, 2015. The final incident triggering discharge according to the employer, was a verbal altercation that took place with the claimant on October 24, 2015. The employer’s testimony was conflicting at times, and it did not produce any first hand witness or even written statement about the claimant’s altercation with her co-worker, in which the claimant denied calling the co-worker a bitch or wanting to punch a dog. The employer also did not produce any witness to the claimant’s calling a dog a “n---er”.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep’t Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. 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 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). Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant’s recollection of the events is more credible than that of the employer. Based on the evidence presented, the employer has failed to establish a final or current act of misconduct, and without such, prior events need not be examined. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case.

Nothing in this decision should be interpreted as a condemnation of the employer’s right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant’s conduct leading separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

DECISION:

The November 17, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

jlc/pjs