IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

RUSSELL K JACKSON Claimant **RACCOON VALLEY PARTNERS LLC** Employer	**APPEAL 17A-UI-10334-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/27/17** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 13, 2017, (reference 01) unemployment insurance decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on October 26, 2017. Claimant participated. Doran Thomas, Erma Boston, and Billie May participated on claimant's behalf. Employer participated through supervisor Tanya Free. Office manager Patty Rogers attended the hearing on the employer's behalf. Official notice was taken of claimant's appeal letter with no objection. Official notice was taken of the administrative record with no objection.

ISSUE:

Is the appeal timely?

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: An ineligibility unemployment insurance decision was mailed to claimant's last known address of record on September 13, 2017. Claimant received the decision. Claimant read the decision after he received it. Claimant testified he went to his local Iowa Workforce Development (IWD) office at 5th Street and Grand Avenue in Des Moines, Iowa within the appeal period. Claimant is not sure the exact date he went to his local IWD office. Claimant testified that two IWD employees filed an appeal on his behalf. Claimant testified that he saw the employees submit his appeal online. The employees told claimant he would receive a response in three to seven days. Claimant did not get a confirmation that his appeal was submitted successfully. The following week, claimant went back to his local IWD office because he had not received anything regarding his appeal. Claimant discovered that his appeal had not been filed. Claimant filed his appeal again on October 10, 2017. The Appeals Bureau did not receive an appeal from claimant until October 10, 2017, which is after the date noticed on the unemployment insurance decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by September 23, 2017.

Claimant was employed part-time as a crew member from November 14, 2016, and was separated from employment on August 22, 2017, when he was discharged. The employer has a policy prohibiting sexual harassment and making threats. Claimant was aware of the policy.

Prior to August 8, 2017, claimant's coworker Haley offered to give him nude pictures for $20.00 and he told her no. The last day claimant worked with Haley was around August 8, 2017. After Haley arrived at work, she asked claimant for a cigarette. Claimant gave her a cigarette. Haley then asked claimant for $5.00, but he refused to give her $5.00. Haley blew up at claimant and told him she would get him fired for sexual harassment. Ms. May heard Haley threaten to get claimant fired. Claimant denied sexually harassing Haley. Claimant also denied threating Haley. Claimant denied threating Haley that he would have someone come beat her up. Claimant did not tell any coworkers that he was going to have someone come beat Haley up. On August 8, 2017, Cindy (a manager) told claimant to go home until he was called back to work. Claimant was called back to work on August 12, 2017. The employer had switched Haley's shift so claimant and Haley would not see each other at work. Ms. Free testified that on August 12, 2017, Haley made a complaint to the employer that claimant was sexually harassing her and she was concerned for her safety. On August 12, 2017, the employer told claimant that he was suspended pending its investigation.

Ms. Free started an investigation regarding Haley's allegation. Ms. Free interviewed claimant on August 12, 2017. Ms. Free testified claimant told her that Haley offered the photos for money, but he did not ask for the photos. On August 14, 2017, Ms. Free interviewed Haley. Haley alleged that claimant offered her money for photos and he and touched her inappropriately. Haley also provided the employer with a written statement as to what happened with claimant. Haley's written statement was not provided for this hearing. On August 15, 2017, Ms. Free interviewed Jennifer (an employee) and requested a written statement. Ms. Free testified that Jennifer told her she observed claimant threaten Haley. Jennifer provided the employer with a witness statement. Jennifer's written statement was not provided for this hearing. On August 16, 2017, Ms. Free interviewed Cindy and requested a statement. Ms. Free testified that Cindy said claimant was making threats towards Haley. Cindy provided the employer a written statement. Cindy's written statement was not provided for this hearing. On August 16, 2017, Ms. Free also interviewed Martin (an employee) and requested a statement. Ms. Free testified Martin stated that that claimant told him he threatened Haley. Martin's written statement was not provided for this hearing.

On August 22, 2017, the employer told claimant he was discharged for making threats. Claimant denied sexually harassing Haley or threating Haley. Claimant had no prior discipline for sexual harassment or making threats. Haley, Cindy, Martin, and Jennifer are still employed with the employer. Haley, Cindy, Martin, and Jennifer did not testify during the hearing.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code section 96.6(2) provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether

> any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The appellant went to his local IWD office and had two employees file an appeal on his behalf in a timely manner but it was not received by the Appeals Bureau. Once claimant discovered that the Appeals Bureau had not received his appeal, he immediately filed a second appeal. Therefore, claimant's appeal shall be accepted as timely.

The next issue is whether claimant was discharged for disqualifying job-related misconduct. The administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

It is the duty of an 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 you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

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:
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> 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.
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> (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(4) provides:

> (4) Report required. The claimant's statement and 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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

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 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). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony or written statements from Haley, Cindy, Jennifer, or Martin, but the employer instead choose to rely on Ms. Free's testimony about what Haley and the other employees told the employer during their interviews and wrote in their witness statements. Ms. Free's testimony as to what Haley and the other employees said and wrote do not carry as much weight as live testimony because live testimony is under oath and the witness can be questioned. It is also noted that Ms. Free initially testified the incident occurred on August 12, 2017, but later she testified it occurred on August 11, 2017. Claimant provided credible, first-hand testimony that he did not sexually harass or threaten Haley and Haley threatened to get him fired. Claimant's testimony was corroborated by Ms. May's testimony that she heard Haley say she was going to get claimant fired.

The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut claimant's denial of said conduct. "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." Iowa Admin. Code r. 871-24.32(4). The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The September 13, 2017, (reference 01) unemployment insurance decision is reversed. Claimant's appeal is timely. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs