

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

DYLAN J JANEY
Claimant

BWC INDUSTRIAL SERVICES LC
Employer

APPEAL 15A-UI-00558-KCT
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 12/21/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 12, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 5, 2015 at 8:30 am. The claimant participated. The employer participated through manager Jimmy Noethe. No exhibits were admitted into evidence.

ISSUE:

Whether the claimant was discharged for work-related, disqualifying misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On April 19, 2013, the claimant began full-time employment with the employer as a vacuum technician. He was separated from employment on December 24, 2014.

On December 20, 2014, the employer hosted a holiday party for its employees. During the celebration, employees were informed that each would receive a gift corresponding to the number on the ticket they received. The claimant received a ticket and selected the matching gift on a table. Later, with other employees, he went back to the gift table and took an additional gift. The gift he selected was a knife with the company logo. He had observed other employees take additional gifts. He understood that the employer intended to provide one gift per employee.

During the holiday party, some supervisory staff observed employees taking more than one gift. No eye-witnesses to the claimant's act of taking a second gift testified at the hearing or provided a sworn statement.

On December 22, 2014, Noethe met with supervisors and advised them to inform their respective supervisees that they had 24 hours in which to return the extra gift or gifts they had taken, without any questions asked or any consequences. Several employees had been observed taking extra gifts and only a portion of the employees were confronted at the party.

Supervisory staff compiled a list of employees who were observed taking an extra gift or more. The claimant's name was on that list.

At the end of the workday on December 22, 2014, the claimant attended a meeting with fellow employees and their supervisors. The supervisors told the employees that they had surveillance video camera footage of employees taking extra gifts and gave the employees 24 hours to return the gifts to their supervisors with no questions or consequences.

The claimant returned to work the next day with the knife but did not see his supervisor for most of the day and did not give the knife to him. On the claimant's return to work on December 24, 2014, he was called to meet with Noethe. The claimant's direct supervisor and two other supervisors were also there. Noethe asked the claimant if he knew why he had been called in. The claimant said yes and gave Noethe the knife that he took from the holiday party. Noethe did not give the claimant any signed, witness statements or video surveillance of the holiday party. Noethe informed the claimant that he was terminated for theft, effective that day.

Noethe did not observe the claimant take the knife. He did not report theft by employees to the police. He wanted to address the situation internally. Noethe was told by other supervisors that the claimant was not taking the situation seriously. He thought the claimant was not appropriately remorseful about taking the extra gift.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

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.

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 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(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.

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.

The conduct for which claimant was discharged was an isolated incident of poor judgment in taking an extra gift at the company holiday party. The claimant acknowledged his conduct, returned the item hours after the stated deadline provided by the employer, and the employer was willing to forgive the conduct of the employees if the return was made within a certain number of hours.

The people with direct knowledge of the claimant's conduct on December 20, 2014, were not provided as witnesses. No request to continue the hearing to obtain the participation of the witnesses was made and no written statements of those individuals were offered into evidence.

The employer's basis for termination was that the claimant did not return the extra gift he took within the stated 24-hour period. The claimant returned the item hours after the employer's deadline. The claimant acknowledged that he took it. Noethe asserted that it was theft for which the employer would not take adverse action against employees, if the items were returned within a specified time. The actual act of taking an additional gift appears to be less concerning to the employer than the timing of the return of the items. Some employees took more than one additional gift. The item was returned and the employer suffered no actual loss.

The claimant's behavior was dishonest. He returned the gift to the employer beyond the 24-hour deadline. The employer was within its right to terminate the claimant. The employer was most concerned with the precise timing of when the claimant returned the object, not the original conduct. The isolated incident of poor judgment, however, does not disqualify the claimant from receipt of unemployment benefits.

DECISION:

The January 12, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Kristin A. Collinson
Administrative Law Judge

Decision Dated and Mailed

kac/pjs