IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JAMES E BERGSMITH
Claimant

SABRE COMMUNICATIONS CORP
Employer

APPEAL NO. 14A-UI-02950-SWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/16/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated March 7, 2014, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on April 11, 2014. The parties were properly notified about the hearing. The claimant participated in the hearing. Erin Baird participated in the hearing on behalf of the employer with witnesses, Jim Handke and Jay Oellien. Exhibits One, Two, and Three were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time as a welder for the employer from November 20, 2006, to February 19, 2014. The claimant was given a last chance agreement on April 20, 2010, after being disciplined and suspended for violent outbursts involving a loss of temper, insubordination, and endangering the wellbeing of employees. Under the last chance agreement, engaging in violent or angry outbursts, insubordination, throwing of company property, or other violations of company property would lead to termination. The agreement was in affect for one year.

The claimant often brought fruit to work for lunch including bananas. Sometimes he decided he did not want to eat the fruit he brought and offered it to coworkers. The claimant was suspended for three days starting on December 13, 2013, because the claimant had offered an African-American employee a banana, which the employer considered racial harassment. The claimant did want the banana and offered it to the African-American employee. His actions had no racial intent. The employee had taken a banana from the claimant before and had never complained. When the employee declined the banana, the claimant then offered it to another coworker who took the banana.

Around February 13, the claimant found out from a coworker that he was not going to get his quarterly bonus because of his suspension back in December. He complained to the coworker about not getting the bonus. He then went to his supervisor and to the human resources generalist to complain about not getting a bonus and finding out about it secondhand.

At some point that day while the claimant was in the locker room talking to an employee, he complained about the loss of the bonus and stated, "no money, no production," and "no money, no cleaning" He said that he hoped they came out and tripped on his dirt. The claimant was unaware that a foreman, Jay Oellien, was in the bathroom in the locker room who overheard the claimant remarks. Oellien reported what he heard to management.

On February 19, 2014, the claimant was discharged for making the remarks in the locker room for violating the employer's policy against threatening or interfering with fellow employees or members of management and inappropriate language.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Iowa Code § 96.6-2; Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (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).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. Oellien was credible, and it is hard to believe that he made up the comments, especially since the claimant admitted that he was upset about not getting the bonus and hearing about it secondhand.

Even based on Oellien's testimony, I cannot conclude this incident rises to the level of willful and substantial misconduct.

In Myers v Employment Appeal Board, 462 N.W.2d 736 (Iowa App. 1990), the court considered whether profanity used in the workplace could constitute work-connected misconduct as defined by the unemployment insurance law. While the court ruled that such language could constitute

disqualifying misconduct, the court cautioned that the language used must be considered with other relevant factors, including the context in which it was said and the general work environment. The court ruled that an employer has the right to expect decency and civility from its employees. The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct. Id. at 738. But the courts have emphasized that "employees are not expected to be absolutely docile and well-mannered at all times." Carpenter v. Iowa Dept. of Job Service, 401 N.W.2d 242, 246 (Iowa Ct. App. 1986). The claimant's comments were made to a coworker without knowledge that a supervisor or other employee was present. Oellien did not state the actual profanity used. The comments were grousing about what claimant thought was an unfair denial of his bonus. I cannot take the comments to be inciting others to slow down production or stop cleaning. Considering the comments in context, no work-connected misconduct has been proven in this case.

DECISION:

The unemployment insurance decision dated March 7, 2014, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Steven A. Wise
Administrative Law Judge

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Decision Dated and Mailed

saw/pjs