IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRANDON L SATERN
Claimant

AFFORDABLE HEATING & COOLING INC
Employer

APPEAL NO. 09A-UI-19349-VST

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/01/09
Claimant: Appellant (2)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated December 8, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 3, 2010. Claimant participated. Employer participated by Bryan Thuma, president. The record consists of the testimony of Bryan Thuma and the testimony of Brandon Satern.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is mechanical contractor. The employer installs air conditioning, furnaces, and duct work. The claimant was hired on June 30, 2008, as a full-time journeyman installer. He was terminated on October 19, 2009, for what the employer believed were multiple violations of its employee handbook.

The first offense occurred on October 1, 2009. The claimant had sustained some injuries in an altercation that had occurred the prior weekend. This altercation was non-work-related. The claimant was having some difficulty getting around and called the secretary to ask if he could go home and recuperate. Mr. Thuma was under the impression that the secretary told the claimant he had to get a doctor's slip. The claimant's understanding was that the secretary recommended that he see a doctor and he elected not to do so. Mr. Thuma asked for the doctor's slip and at some point the claimant told Mr. Thuma that he did not see a doctor.

On or about October 2, 2009, the claimant got sick on the job site. He was throwing up and was told to go home. The claimant does not have a driver's license and so his apprentice drove him home in a company vehicle. The claimant did not call Mr. Thuma to tell him that he needed to go home, but the other members of the crew were aware that he had gone home.

Another problem arose over some work that needed to be finished in Waterloo, Iowa. The claimant proved hard to contact and Mr. Thuma was concerned about completing the job. The lack of communication between the claimant and Mr. Thuma led to Mr. Thuma contacting the apprentice. The apprentice told Mr. Thuma that there was more work to do at the Waterloo site than Mr. Thuma had been led to believe. In addition, the apprentice told Mr. Thuma that he had gotten the claimant in Clear Lake and driven him to the work site after the claimant had spent the weekend in Clear Lake. The apprentice also told Mr. Thuma that he took the claimant on personal errands such as grocery shopping while using the company vehicle. The employer also obtained information from several other unnamed employees that the claimant had been consuming alcohol on the job.

Mr. Thuma called the claimant on November 19, 2009, and told the claimant he was letting him go. The claimant's tools were later delivered to him by the employer.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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.

871 IAC 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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In order to justify disqualification, the evidence must establish that the final incident leading to the

decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988) The employer has the burden of proof to show misconduct.

After carefully listening to the testimony in this case, the administrative law judge had the impression that there had been an evolution of the employer/employee relationship. What had been a small company at the time the claimant was hired had grown to approximately 25 employees at the time the claimant was terminated. The claimant had become accustomed to working fairly independently and having a friendly relationship with Mr. Thuma. As a result, the claimant did not seem to take much notice of things such as an employee handbook and insurance. He took for granted the employer's largesse, particularly when it came to having a company vehicle and a driver at his disposal. The claimant did not have a driver's license and the employer had been willing to have the apprentice drive the claimant to and from work. The claimant took advantage of this and as a result, the driver went to Clear Lake to get the claimant after he was stranded there over a weekend and to run personal errands.

In October 2009, Mr. Thuma appears to have wanted to make the claimant more accountable and the claimant resisted. What cannot be determined is what exactly led to the decision to terminate the claimant. Mr. Thuma indicated that it was a combination of violations. However, he was particularly influenced by some information he obtained from the apprentice and other unnamed workers, namely, that the claimant had been drinking on the job and that the claimant had been using the company vehicle for something other than work, without Mr. Thuma's direct knowledge or approval. When these latter events occurred is not known. The claimant denied consuming alcohol on the job site with the exception of one time when a homeowner offered the entire crew some beer. The claimant said that "the office" had approved use of the company vehicle. The apprentice did not testify at the hearing. None of the individuals who reported the alcohol use testified at the hearing.

Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code section 17A.14(1). Because of the nature of the evidence produced at hearing, the employer is unable to show misconduct.

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Allegations of misconduct 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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In Schmitz v. Iowa Department of Human Services, 461 N.W. 2d 603, 607-608 (Iowa App. 1990), the Court requires evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test, requiring agencies to employ a "common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better evidence; (4) the need for precision; (5) the administrative policy to be fulfilled." Id. at 608

The evidence to prove job related misconduct is largely hearsay in nature. Mr. Thuma relied on statements made by other individuals in large part to make his decision to terminate the

claimant. Although the administrative law judge is skeptical about the credibility of some of the claimant's testimony, the individuals with direct knowledge of some of these handbook violations did not testify. No assessment can be made about the credibility of their statements. There is also no definitive evidence of a current act of misconduct. The employer has not sustained its burden of proof to show misconduct. Benefits are allowed if the claimant is otherwise eligible

DECISION:

The decision of the representative dated December 8, 2009, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs