

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEWART W DRAKE
Claimant

APPEAL NO. 11A-UI-13348-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CITY OF DES MOINES PAYROLL DEPT B
Employer

**OC: 09/11/11
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant Stewart Drake filed an appeal from the October 3, 2011 (reference 01) decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on November 1, 2011. Claimant (Drake) participated with and was represented by Officer Stewart Barnes. Employer (DMPD) participated through Assistant Chief of Police David Lillard and was represented by Carol Moser, Assistant City Attorney. Employer's Exhibits A through G were admitted to the record. Claimant's Exhibit 1 was admitted to the record.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Drake was employed full time as a senior police officer in the vice and narcotics control section from January 22, 1990 and was separated from employment on September 13, 2011. He was arrested on June 25, 2011 and charged with domestic assault causing injury to Melissa "Penny" Winter on June 24, 2011. (Employer's Exhibits B and C, page 6) He was placed on paid administrative leave immediately. There was a criminal police investigation and administrative review of his actions completed in late August 2011.

Reporting officer Sergeant Joe Leo reported in the June 25 case investigation that Drake and Winter had lived together, she moved out in April 2011, and had recently moved back in but maintained another residence in Ankeny. (Employer's Exhibit C, page 1) Drake returned home after having consumed alcohol and Winter confronted him about ex-girlfriend Jennifer. He did not want to discuss it but Winter was persistent. They ended up on the couch with Drake on top of Winter, holding her down with his forearm across her neck. She does not recall how she got the black eye, except that Drake caused it. (Employer's Exhibit C, page 4) Drake denied any physical altercation with Winter but agreed they argued about Jennifer. There were no visible scratches on claimant or blood on his shirt. Leo smelled alcohol on Drake and noted Winter to be "visibly shaken, stating she did not remember how the black eye occurred, she appeared

evasive in answers, relating to how the injuries occurred.” (Employer’s Exhibit C, page 4) Sergeant Richardson spoke with Winter later on June 25 and advised her that there was an order of protection in place, which remained effective at the time of hearing. (Employer’s Exhibit G) She had moved out of Drake’s home by that point and noted that her daughter Samantha had seen blood on the couch. Winter’s former brother-in-law, Iowa State Patrol Captain Mike Winter, told Richardson that she called him at 12:45 on June 24 about the incident. When he arrived, he noted her left eye was black and blue, she had some dried blood in her ear, and she was complaining of left side neck pain. He took her to the hospital and notified police that domestic abuse had occurred. (Employer’s Exhibit C, page 5) Captain Winter also gave a statement to Keller on June 28. He noticed that she was not doing well and was crying, shaking, and scared. Her left eye was almost swollen shut with a goose egg about golf ball size. There was a cut on her left cheek and blood on her ear and the back of her neck. (Employer’s Exhibit E, page 4)

On June 27 Winter gave a statement to Officer James Keller. Winter and Drake had been drinking outside in the garage and driveway area. Winter’s daughter Samantha and Drake’s son Xavier were present. Winter and Drake went inside, sat on the couch and argued about the ex-girlfriend. “He got mad and brought his forearm across my throat and we fell back on the couch. I was struggling to free myself, I took off my glasses and put them on the coffee table next to the couch. His body weight was on top of me. He grabbed my throat and the next thing I remember I was shaking my head grabbing his shirt and I scratched at his chest to free myself. My face felt different and he got up off the couch and said he was going upstairs to pass out.” (Employer’s Exhibit D, page 3) “I kept shaking my head because my left eye felt weird. I went into the bathroom to look in the mirror and my left cheek was swollen and already bruising and there was blood running down the left side of my face. I went outside and Stew’s son saw me. He asked me what happened and I told him his Dad hit me.” (Employer’s Exhibit D, page 4)

Leo reported to Keller on June 28 that Winter told him after she confronted Drake about Jennifer the next thing she knew was that they were on the couch, claimant’s forearm across her choking her. She did not know how she got the black eye. Winter told him that Drake had pushed her before but not anything to this degree. When Leo and Captain Michael Hoffman went to interview Drake he allowed them to look at his arms, which did not have scratches, but would not allow them to look at his chest, “was adamant nothing happened,” and was otherwise verbally abusive and uncooperative. (Employer’s Exhibit E, pages 4, 5)

In a supplemental incident investigation report dated June 27 Keller noted that Winter told him in October 2010 Drake had pushed her down in the driveway and he struck her head but did not report it other than to mutual friends. (Employer’s Exhibit E, page 1) She told Keller, who paraphrased, “I get visions of him coming at me, I remember being on the couch, his arm across my neck, next I remember standing up face to face, my left eye felt like I had something in it, while on the couch I know he has his knees and all his weight on me, I was grabbing at his shirt, it all happened on the couch.” (Employer’s Exhibit E, page 2) Keller also interviewed Drake’s 18-year-old son Xavier ‘Zip’ and his mother Kim on June 28. Xavier observed Drake and Winter were drunk and arguing and went inside the house. When Winter exited the house he noticed she had a swollen cheek and was bleeding. Xavier went inside the house and confronted Drake asking if he had hit Winter. Drake told him that he had because she would not leave him alone about Jennifer. (Employer’s Exhibit E, page 3)

The employer used witness statements and photographs of Winter taken at the hospital and at the June 27 interview in making the decision to discharge (Employer’s Exhibits D and F) for violations of Department Personnel and Administrative Rules that require employees of the department shall conduct themselves in a manner that will reflect credit on themselves, the

department, and the City of Des Moines; treat department personnel with respect; obey, federal, state and local laws; and shall not drink an alcoholic beverage which results in an act which brings discredit upon themselves or the department. (Employer's Exhibit A) Winter advised the county attorney on October 12, 2011 that she would not cooperate in the criminal charges against Drake but did not specifically state that he had not pushed, choked, hit her, pinned her down, or otherwise cause her injuries. (Claimant's Exhibit 1) Drake admitted in his hearing testimony that they had been drinking and he pushed her away and they fell on the couch with him on top of her.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

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.

The employer has the burden of proving disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The City of Des Moines Police Department has a clear interest in requiring its police officer employees to hold themselves to at least the same standard of conduct as the general public, even while off-duty. See, *Kleidosty v. EAB*, 482 N.W.2d 416, 418 (Iowa 1992) and *Diggs v. EAB*, 478 N.W.2d 432 (Iowa App. 1991). Although Winter wrote that she would not cooperate in the criminal case against Drake she did not specifically withdraw statements made to Drake's son at the time, and multiple law

enforcement officers in the four days after the assault, and never said pointedly that Drake did not push her, hold her down on the couch, put his forearm across her throat, choke her, or cause her bruising and black eye. Thus, her October 12 statement is unpersuasive. Drake did admit that he pushed her and he fell on top of her on the couch. Given the degree and number of Winter's injuries, that is the least of what happened. The ALJ is persuaded that Winter's initial statements to Xavier, her former brother-in-law Iowa State Patrol Captain Mike Winter, and investigating officers are credible. This is sufficient evidence, even without a guilty plea or conviction requiring a higher burden of proof than for determining qualification for unemployment insurance benefits, for the DMPD to conclude that claimant's conduct reflected poorly upon it and was in violation of department rules. Drake was discharged for reasons related to job misconduct. Benefits are denied.

DECISION:

The October 3, 2011 (reference 01) decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css