IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TIMOTHY L LANMAN Claimant **KRAFT HEINZ FOODS COMPANY** Employer	**APPEAL 16A-UI-12590-DL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/30/16** **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the November 18, 2016, (reference 01) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on December 28, 2016. Claimant participated. Employer participated through associate human resource manager Rodney Warhank. Claimant's Exhibit A was received. Employer's Exhibit 1 was received. The administrative law judge took official notice of the administrative record, including fact-finding documents.

ISSUE:

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: Claimant was employed as a full-time area mechanic from 2005, through November 1, 2016. His last day of work was October 19, 2016. The employer discharged him because of alleged behavior during a meeting on that date to discuss a proposed warning about answering the supervisor's calls to his company-provided phone on October 18. Claimant, who was with contract worker Travis and mechanic Perry Miller at the time, answered the phone on two occasions when it rang, said "hello" multiple times, could not hear anyone on the other end and the screen went blank so he told a coworker they should get back to work and hung up. Workers wear hearing protection in the production area. He believed it was a non-supervisor who usually called him for assistance so he went to seek her out. Sam Otto alerted him it was supervisor Nicholas Turnbull who was calling and directed him to the maintenance shop for a meeting but gave no time frame.

Claimant is a self-described large person with a loud voice who uses sarcasm. He met with Turnbull and union steward Todd Moeller. He asked why he was called to the office. Turnbull told him it was for a warning for failure to answer his phone. Claimant recalled that Turnbull spoke to him disrespectfully, belittled and verbally attacked him so he dropped the cell phone on the desk and explained he tried to answer it but it did not work. Had he thrown the phone as the

employer alleges the battery compartment door would have come off as it often does, but it did not. He was upset about a warning for an issue created by a phone that did not work properly but did not display any indication of physical violence. Turnbull would not admit the phone was not operating properly so claimant left the meeting in order to "avoid continuing badgering." Claimant agrees in retrospect that he could have found areas for improvement during his interaction with Moeller but believed it was mutual.

He had reported phone problems to Turnbull in the past and as recently as early the same shift. Claimant had been on lunch break and closed his eyes while Turnbull and someone else were talking in the area. Turnbull asked if he was sleeping. Claimant answered sarcastically that he had woken him up on his break. Turnbull said he was walking claimant out for sleeping on the job. Claimant clarified that he was not sleeping. Turnbull became angry saying he had been trying to call claimant. Claimant asked Turnbull to call him then and there. The phone did not ring and claimant asked him how could he answer when it does not ring. He had also asked for, but was not provided, a clip to wear the phone next to his chest so could feel vibrations. Wendy on first shift had said there are problems with the phone on other shifts too.

Turnbull, temporary supervisor Elijah Bunch, Moeller, Travis, Miller, Otto, Jay Ripslinger and Joe Sawyer did not participate in the hearing and the employer did not provide written statements.

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).

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a single witness or witness statement with direct knowledge of the situation. Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. 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 section 96.5(2)a provides:

> **Causes for disqualification.**
> 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. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

Misconduct "must be substantial" to justify the denial of unemployment benefits. *Lee*, 616 N.W.2d at 665 (citation omitted). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Id.* (citation omitted). …the definition of misconduct requires more than a "disregard" it requires a "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." Iowa Admin. Code r. 871–24.32(1)(a) (emphasis added).

Whether an employee violated an employer's policies is a different issue from whether the employee is disqualified for misconduct for purposes of unemployment insurance benefits. *See Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000) ("Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." (Quoting *Reigelsberger*, 500 N.W.2d at 66.)). "Balky and argumentative" conduct is not necessarily disqualifying. *City of Des Moines v. Picray*, (No. __-__, Iowa Ct. App. filed __, 1986).

While the claimant's admitted frustration may have led to behavior that was less than ideal, the employer has not met the burden of proof to establish that claimant indicated any violent tendencies or threats or acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

DECISION:

The November 18, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/rvs