IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RICKY R OLSON
Claimant

MASON CITY MOTEL DEVELOPMENT INC
Employer

APPEAL NO. 11A-UI-10186-NT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/03/11
Claimant: Appellant (2)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated July 27, 2011, reference 01, which denied unemployment insurance benefits. After due notice, a telephone hearing was held on August 29, 2011. Claimant participated personally. The employer participated by Ms. Crystal Shellhart, Housekeeping Manager.

ISSUE:

The issue is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Ricky Olson was employed by Mason City Motel Development, Inc. d/b/a Holiday Inn Express and Suites from January 2011 until July 5, 2011 when he was discharged by telephone. Mr. Olson most recently worked as a part-time housekeeping employee and was paid by the room. His immediate supervisor was Crystal Shellhart.

On July 2, 2011, Ms. Shellhart was informed by the motel's front desk manager that a guest had complained that Mr. Olson "smelled of alcohol." The front desk clerk was also of the opinion that the claimant smelled of alcohol that day and informed Ms. Shellhart that Mr. Olson had been "sent home." The following two days the claimant was contacted by the company and told that he need not report for work. Subsequently, on July 5, the claimant was contacted by telephone and informed by Ms. Shellhart that he was being discharged for smelling of alcohol. The claimant, believing that Ms. Shellhart was referring to a different day stated, "whatever."

Because the claimant had been warned on two occasions previously about being under the influence of alcohol or smelling of alcohol, a management decision had been made by the company to discharge Mr. Olson from his employment based upon the allegations of July 2, 2011. The employer did not confirm that Mr. Olson was under the influence of alcohol or

smelled of alcohol by having the claimant tested on July 2, 2011. The claimant instead was merely sent home.

It is the claimant's position that after being warned he did not use alcohol during or before work and that he did not smell of alcohol on July 2, 2011.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is not.

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 proof in this matter. See Iowa Code § 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

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 upon such past acts. The termination of employment must be based on a current act. See 871 IAC 24.32(8).

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 disclose deficiencies in that party's case. See Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

While hearsay evidence is admissible in administrative proceedings, it cannot be accorded the same weight as sworn, direct testimony. In this matter the claimant participated personally and testified under oath that he was not under the influence of alcohol and did not smell of alcohol on July 2, 2011. In contrast, the employer has relied upon hearsay statements that a company guest and another employee had smelled alcohol on the claimant that day. The employer did not elect to have the company employee with direct knowledge of the events on July 2, 2011 testify during the hearing on this matter and the claimant's testimony is not inherently improbable.

Iowa Code § 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. In Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553 (Iowa 1999), the Supreme Court of Iowa considered the statute. Thereafter, in Harrison v. Employment Appeal Board, 659 NW 2d 581 (Iowa 2003). The Iowa Supreme Court held that a drug test that was not in compliance with Iowa law could not be used as a basis for disqualifying a claimant for benefits. In the present case, although the employer had reasonable suspicion to request a breath alcohol test on the day in question the employer did not do so. The employer also did not provide any direct witnesses at the hearing to sustain its burden of proof in establishing the claimant did in fact smell of alcohol in violation of policy after being warned.

While the employer's decision to terminate Mr. Olson may have been a sound business decision, the evidence in the record is not sufficient to sustain a finding of misconduct disqualifying the claimant from unemployment insurance benefits. Benefits are allowed, providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated July 27, 2011, reference 01, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

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Terence P. Nice
Administrative Law Judge

_____
Decision Dated and Mailed

pjs/pjs