IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

STEPHEN SPILLSBURY Claimant **YELLOWBOOK INC** Employer	**APPEAL 15A-UI-04093-KC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/15/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 31, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on May 5, 2015. The claimant participated. Matt Hastings testified on behalf of the claimant. The employer participated through Liz Anderer, human resources director. Kyle Kiner, the claimant's former supervisor, was scheduled to testify but was unable to do so on the day of the hearing. The employer faxed an employee agreement, a copy of which was not received until after the hearing. The employer representative read relevant portions of the document into the record and the claimant had received a copy of the agreement.

ISSUE:

Was the claimant discharged for work-related, disqualifying misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as an account executive beginning July 29, 2013, and was separated from employment on March 17, 2015, when the employer terminated his employment based on alleged violation of the employee agreement and outside employment policy.

The claimant signed an employee agreement in July 2013 that contained a provision prohibiting solicitation, service, or diversion of customers on behalf of the employee, or for a third party, any customers the claimant had encountered as an employee. The claimant did not violate that provision.

The employer thought the claimant had solicited existing customers with a competing business. The claimant did not own or operate a competing business. He advised Hastings, a college student, about printing options for a college assignment. The claimant had extensive printing

experience. Hastings was developing a concept to be test-marketed as part of the college assignment. The claimant and Hastings discussed the concept and printing at the bar where Hasting was a bartender.

The claimant did not solicit any of the employer's customers with Hastings' college project. He did not create Hastings' Facebook page about the test-marketing of the concept involved in the college project. The claimant did not authorize his name to be used as a contact on the Facebook page, although his name was among those listed. Hastings created business cards as part of his class project with the names of various people, including that of the claimant. The claimant gave the business cards to people in the bar but did not give cards to his employer's customers. Hastings submitted his project for a grade and has not created the business; it remains a concept.

Hastings' concept involved use of a smart-phone and a business card which resulted in moving graphics on the smart-phone. The claimant has no knowledge of the technology. Hastings has not paid the claimant. No agreement was entered into by Hastings and the claimant about any business related to the concept. The claimant gave Hastings printing advice about his college project.

The claimant did not give a business card from Hastings' college project to "Completely Kitchens," who was one of the employer's customers. The college project was for a 2015 assignment. The claimant last worked with the kitchen-related customer in July or August of 2014. The claimant did not knowingly speak to any potential clients of the employer or any leads for potential customers about a competing business. Neither Hastings nor the claimant had a business.

During his tenure at Yellowbook, the claimant was not employed elsewhere. He was unaware that he had to discuss all potential outside employment activities with his supervisor before undertaking outside employment. Some members of his team had outside employment while he was with the employer.

On March 17, 2015, the claimant met with his supervisor Kyle Kiner. The supervisor thought Hastings was the claimant's business partner. The claimant denied that and was not allowed to explain the situation. Kiner provided no documentary proof of any outside employment or competing activities to the claimant in the meeting. Kiner left during the meeting to consult with Anderer. On his return, he told the claimant that the employer had determined the claimant was selling for another entity and his employment was terminated. The claimant received no prior warnings about similar situations and had not been told his job was in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Supervisor Kiner, the person with direct knowledge of the situation, other than claimant, was listed as a witness but was unavailable to testify due to an emergency. No request to continue the hearing was made and no written statement of Kiner was offered. The business card which purportedly was given to a customer of the employer was not submitted. 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.

When the record is composed 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). 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 § 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:
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> 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.
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> 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. *Huntoon v. Iowa Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. 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 on such past act or acts. The termination of employment must be based on a current act.

In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. _-__, (Iowa Ct. App. filed __, 1986).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation.

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined. The claimant was not discharged for a work-related, disqualifying act of misconduct. Benefits are allowed.

DECISION:

The March 31, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

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Kristin A. Collinson
Administrative Law Judge

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Decision Dated and Mailed

kac/pjs