

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JERMAINE P MCCLUNG

Claimant

APPEAL 16A-UI-08559-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DOHERTY STAFFING SOLUTIONS

Employer

OC: 07/03/16

Claimant: Respondent (1)

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

Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the July 26, 2016, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 24, 2016. The claimant participated personally, and with witness, Darrius Flowers, ex-employee of employer. The employer participated through Glenda Niemic, unemployment insurance administrator. Erica Simmer, site manager, also testified for the employer. Employer exhibit 1 was received into evidence over objection. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: the claimant worked on one assignment for this employer, at client, Cargill Inc., and that the assignment was ended by the employer on July 1, 2016, when he was discharged from the assignment and future assignments for tampering or damaging food product.

The claimant worked in food production, and specifically was working on the J-Belt on the production floor with a team of other employees, who were responsible for inspecting food product as it came from the oven, on the inspection line, and then moved into the freezer for cooling before being packaged on behalf of Cargill's customers. As part of the job duties, the claimant would visually inspect product for discoloration as well as broken pieces or disfigured

product, and discard them before they reached the freezer. The claimant had no prior warnings for failure to inspect or damaging product before discharge. Approximately ten days before discharge, the claimant and other employees were verbally warned as a group about making sure product was inspected after product was returned by a customer, resulting in a loss by the employer, for failure to inspect. No specific employee was singled out for the failed inspection or for who caused the damage to the product at that time, and no formal discipline was issued.

On June 24, 2016 at approximately 5:15 p.m., after the claimant's shift ended, product was retrieved from the freezer that had significant damage to it. The second shift supervisor, Carly Albers, reported the damage to Erica Simmer, and determined based on the timing of the product being in the freezer to cool, that the damaged frittatas should have been inspected by the people working the claimant's shift, on the J-Belt line, in the 4:00 hour. The frittata product that was damaged was not date or time stamped, and no surveillance footage shows the employees on the J-Belt working on June 24, 2016. The employer reported an unknown quantity of frittatas failed inspection, and had broken pieces as well as "finger holes" poked into them.

An investigation ensued, and the claimant was questioned. The claimant reported he was not working on the line at the end of his shift that day and was cleaning instead. He further denied participating in any damage or tampering of product, and was unaware who was responsible. No employee who saw the claimant damage product was present for the hearing, nor was any written statement furnished by the employer. Upon completion of the investigation, the employer determined the claimant (and two other employees) to be responsible for the damage and was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,367.00, since filing a claim with an effective date of July 3, 2016. The administrative record also establishes that the employer did participate in the July 25, 2016 fact-finding interview.

REASONINGS AND CONCLUSIONS OF LAW:

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.

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. *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 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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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). Workers in the human food production and processing industry reasonably have a higher standard of care required in the performance of their job duties to ensure public safety and health. The undisputed evidence presented is that the claimant worked on one assignment for this employer, at client, Cargill Inc., and that the assignment was ended by the employer on July 1, 2016 and that he was fired after a single incident in which he was accused of tampering or destroying food product, specifically frittatas, on June 24, 2016. The claimant denied being on the J-Belt at the end of his shift on June 24, 2016, but stated he was instead doing cleaning duties. The claimant further denied that he had ever intentionally damaged product on June 24 or any other day. The employer presented no first-hand witness or written statement of anyone who saw the claimant damage the product, nor any kind of surveillance footage of him on the line at the time in question. 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. Based on the evidence presented, the administrative law judge is not persuaded the claimant was personally responsible for the damage done to any frittatas on June 24, 2016. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading to separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

Since the claimant is eligible for benefits, the issue of recovery of any overpayment and relief of charges are moot.

DECISION:

The July 26, 2016, (reference 02) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The claimant has not been overpaid unemployment insurance benefits. The employer's account shall be charged.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/pjs