

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

DAVID B STEELE

Claimant

APPEAL NO. 18A-UI-10263-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

G-MAC DOOR & HARDWARE CO

Employer

OC: 09/02/18

Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

David Steele (claimant) appealed a representative's October 2, decision (reference 02) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with G-Mac Door & Hardware (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 29, 2018. The claimant participated personally. The employer participated by Mark Ray, President.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on April 15, 2016, as a full-time project manager. The employer has a handbook but the claimant did not receive it. When the office opened in Melbourne, Iowa, the employer in East Moline, Illinois, hired three employees. One employee was to travel most of the week. The claimant and another employee worked on site. The employer visited the Melbourne, Iowa, office once when it first opened.

At some point, the employer terminated one of the employees that worked on site. The claimant unloaded trucks, ran the forklift, sold items, and was a project manager. When the other employee was terminated, his sales went down. He could not leave when deliveries came in. He worked from 8:10 a.m. to 4:40 p.m. and rarely left the building. On August 29, 2018, the employer sent the claimant an e-mail saying that if things do not get turned around, the employer would shut the office down. The claimant thought the employer was running out of money.

On September 4, 2018, a service technician sent the employer a picture of alcohol in the employer's refrigerator. The claimant was not aware of alcohol in the refrigerator. On September 6, 2018, a customer said the claimant took a leave of absence even though the claimant was at work every day. On September 6, 2018, the employer discovered an accepted purchase order on May 25, 2018. The claimant said the purchase order started on May 25, 2018. The customer still had to go through the process of deciding exactly what it wanted. The

employer sent the claimant an e-mail on September 6, 2018, leading the claimant to believe the business was shutting down. The employer intended to terminate the claimant for poor performance.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. *Huntoon v. Iowa Department of Job Services*, 275 N.W.2d 445 (Iowa 1979). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988). The employer discharged the claimant for poor work performance and has the burden of proof to show evidence of intent. The employer did not provide any evidence of intent at the hearing. The claimant's poor work performance was a result of his lack of time and work force to complete all the duties. Consequently the employer did not meet its burden of proof to show misconduct.

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as the employer had not previously warned the claimant about any of the issues leading to the separation, it has not met the burden of proof to establish the claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

The claimant's and the employer's testimony is inconsistent. The administrative law judge finds the claimant's testimony to be more credible because he was an eye witness to the events for which he was terminated. The employer was not an eye witness. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose not to do so. The employer did not provide first-hand testimony or statements at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. In addition, the employer did not provide any documentation to corroborate its allegations of misconduct. The employer did not provide sufficient evidence of job-related misconduct. It did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's October 3, 2018, decision (reference 02) is reversed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs