

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

HIRAM TOBIAS
Claimant

3M COMPANY
Employer

APPEAL 17A-UI-03454-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/26/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 22, 2017, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on April 19, 2017. The claimant participated personally and was represented by Leonard Bates, attorney at law. Beatriz Mate Kodjo attended as co-counsel. Prior to the hearing, the employer submitted a letter of non-appearance and did not participate. The employer did not respond to the claimant's discovery (Department Exhibit D-1) requests. The claimant, through counsel, filed a motion to compel, for sanctions, and for postponement (Department Exhibit D-2). The requests were denied by the administrative law judge at the hearing as untimely (the postponement request) and moot (since the employer elected not to participate). Claimant Exhibit A and Department Exhibits D-1 and D-2 were admitted into evidence. 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.

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: The claimant was employed full-time as a splitter operator and was separated from employment on February 27, 2017, when he was discharged for allegedly violating the employer's code of conduct.

The employer has a code of conduct and policies regarding professional interactions. The claimant was aware of the employer's policies. The claimant, who is African American, had an ongoing history of conflict with a co-worker, Jason Watson, who is Caucasian. Mr. Watson was involved in each of the incidents involving the claimant being disciplined, including discharge. The claimant is unaware of Mr. Watson ever being disciplined for his part in any of the confrontations. The undisputed evidence presented at the hearing was that after each incident, as well as several others, the claimant attempted to make the employer aware of concerns

involving harassment by Mr. Watson, and went to his immediate manager, Wade Henry, to Mr. Henry's manager, Joe Snyder, to human resources manager, Todd Weber, and Mr. Weber's manager, Mr. Skarr, without any resolution, except the claimant and Mr. Watson being told to stay in their respective work areas and limit interaction with each other.

The undisputed evidence is the claimant made numerous complaints about Mr. Watson to the employer prior to discharge. These included an incident which occurred after a disciplinary suspension, in which he returned to his desk, the claimant found a bottle of company issued white lotion, which had been covered with dark marker, and someone had drawn on eyes and "big lips" on it, eluding to the claimant being African American. In addition, the claimant reported an incident between he and Mr. Watson in 2016, in which Mr. Watson called him a "n-----" after a confrontation about possible car vandalism.

In October 2014, the claimant was disciplined after reportedly referencing putting someone in a (body) bag, following a conflict with an employee and Mr. Watson. The claimant acknowledged during the verbal dispute being a "little loud" but denied the body bag reference. He was suspended for five days as a result of the incident, and the other individuals were not. The claimant had a second incident in 2016 when he reported to work late and the night crew was leaving. He encountered Mr. Watson and about 15 peers who tried to block the way for the claimant to walk by to his work station. The claimant and Mr. Watson exchanged looks only, and not words, as the claimant acknowledged his safety was at risk if an altercation broke out, given the number of people with Mr. Watson. The claimant again reported his concerns to the employer about treatment by Mr. Watson, and was issued a five day suspension for the incident. It is unclear from the evidence why the claimant was disciplined, or why Mr. Watson was not also disciplined.

The final incident occurred on February 6, 2017, when the claimant approached his work space and saw three people, including Mr. Watson, in his workspace. The claimant said to Mr. Watson, "you should not be here. We were told to stay away from each other." Mr. Watson mumbled something and left. The claimant denied yelling, raising his voice, using profanity or making any threats to any of the three individuals. The claimant continued to work his shift without incident before taking a prescheduled vacation. Upon return, he learned of his discharge, where the employer did not disclose details.

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.

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.

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. 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). 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

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.

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.

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 final incident occurred on February 6, 2017, when the claimant told Mr. Watson to leave his work station. This was based on prior directives by the employer that advised the claimant and Mr. Watson to stay away from each other. There was no evidence presented that the claimant's conduct to Mr. Watson advising him to stay away from his work area and reminding him not to be in the claimant's workspace, violated any employer policy or rule. Further, the claimant denied coupling the comments to Mr. Watson with any threatening language or conduct or profanity, yet he was discharged for the incident.

The undisputed evidence is the claimant had an ongoing history of conflict with Jason Watson, who had displayed a pattern of intimidating and harassing behavior, even going so far as to reference the claimant as a "n-----" at the workplace. The claimant made the employer aware of the ongoing issues, raising concerns to his manager, Wade Henry, the next level supervisor, Joe Snyder, to human resources manager, Todd Weber, and Mr. Skarr, who was Mr. Weber's manager. The administrative law judge finds it unsettling that Mr. Watson was not disciplined for his conduct, inappropriate comments, nor those involving the claimant, yet the claimant was issued suspensions and discharged. From the evidence presented at the hearing, the claimant appeared to be the subject of disparate treatment by the employer, which cannot support a disqualification of benefits.

The employer has the burden of proof to establish misconduct in a discharge situation, and the employer did not rebut the claimant's credible testimony that he was discharged after following an employer directive when he told Mr. Watson to leave his workstation, and did so without

threat or profanity or escalation. 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. The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

DECISION:

The March 22, 2017, (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.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs