

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NICHOLAS J MINER
Claimant

WIESE INDUSTRIES INC
Employer

APPEAL 15A-UI-04562-EC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/13/14
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The Claimant, Nicholas Miner, filed an appeal from the April 7, 2015, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for misconduct. The parties were properly notified about the hearing. A telephone hearing was held on May 11, 2015. The claimant, Nicholas Miner, participated. The employer, Wiese Industries, Inc., participated through Alan Lenz, General Manager; Donna James, HR Specialist; and Jim Stahl, Production Supervisor. The claimant's witness, JR Fessler, also participated and testified.

The employer submitted documents which were labeled Exhibits E1 – E18. These exhibits were described on the record and were admitted into evidence without objection. The claimant submitted documents which were labeled Exhibits C1 – C6. These exhibits were described on the record and were admitted into evidence without objection.

ISSUE:

Was the separation a discharge for misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a hot production worker from November 12, 2012, and was separated from employment on March 26, 2015, when his employment was terminated for misconduct, specifically violating the Employer's Corporate Rules & Regulations, when he struck a co-worker on company property. The claimant was also found to have violated the rule prohibiting threatening, intimidating, coercing or interfering with fellow employees on company property.

The claimant signed the Employer's Corporate Rules & Regulations, which included the policies described above, on his first day of employment, November 12, 2012.

On March 25, 2015, the claimant had a disagreement with two co-workers regarding whether or not a door should be open or closed. Specifically, the claimant wanted the door to be closed. The two co-workers wanted the door to be open. The claimant closed the door. One of his

co-workers opened the door. The claimant closed the door again. Another co-worker opened the door again. The claimant used profanity towards the co-worker and told him not to touch the door again. The co-worker started to open the door again. The claimant struck or hit the co-worker's hand, slapping it away from the door opener.

On March 26, 2015, Alan Lenz, the general manager, met with the claimant, his supervisor, Jim Stahl, and his union representative, JR Fessler. They met to discuss the incident that occurred on March 25, 2015. Several co-workers prepared written statements immediately following the incident. After reading the witness' statements, and hearing the claimant's version of events, Alan Lenz told the claimant that his employment was terminated.

In Mr. Lenz's opinion, the claimant thought his behavior was acceptable, and that he had not done anything wrong. The claimant generally denied striking his co-worker. The claimant denied any intimidating or bullying conduct. The claimant denied using any intimidating or threatening language. He claimed that the co-worker stopped him from closing the door.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for job-related misconduct.

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(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.

The employer has an interest and duty in protecting the safety of all of its employees. The Claimant's threatening language and physical aggression toward another employee violated specific work rules. His conduct went against commonly known acceptable standards of work behavior. This behavior was contrary to the best interests of employer and the safety of its employees and is disqualifying misconduct even without prior warning. Benefits are denied.

It is my duty, as the administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

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 evidence he or she believes; 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. *Holtz*, 548 N.W.2d 162 at 163.

I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I reviewed the exhibits submitted by both parties and noted the dates when the witness statements were written. I find the employer's version of events to be more credible than the claimant's recollection of those events.

Where a claimant participated in a confrontation without attempt to retreat, the Iowa Court of Appeals rejected a self-defense argument stating that to establish such a defense the claimant must show freedom from fault in bringing on the encounter, a necessity to fight back, and an attempt to retreat unless there is no means of escape or that peril would increase by doing so. *Savage v. Emp't Appeal Bd.*, 529 N.W.2d 640 (Iowa Ct. App. 1995).

This claimant failed to make any such showing that he acted in self-defense in this case.

When the record includes hearsay evidence, the written statements of co-workers who did not participate in the hearing, that evidence must be examined closely in light of the entire record. *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa 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.

I evaluated the claimant's co-workers' written statements, which were prepared soon after the incident, and find them to be generally trustworthy, accurate and credible. I evaluated the claimant's written statement, submitted with his appeal, and find it to be generally self-serving and inconsistent with the other credible evidence.

DECISION:

The April 7, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for reasons related to job misconduct. Benefits are withheld until such time as the he works in and has been paid for wages equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Emily Gould Chafa
Administrative Law Judge

Decision Dated and Mailed

ec/css