

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

NATHAN M NOE
Claimant

**VERMEER MANUFACTURING COMPANY
INC**
Employer

APPEAL 15A-UI-12980-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/01/15
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 November 20, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on December 11, 2015. The claimant participated personally. The employer participated through Morgan Landon, human resources representative. Julia Schurman also attended on behalf of the employer but did not testify. Employer Exhibits One through Seven were admitted into evidence. The administrative law judge took official notice of the administrative record, including fact-finding documents.

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 was employed full-time in plant service and maintenance, until he was separated from employment on October 29, 2015, when he was discharged (Employer Exhibits One and Two).

The employer has a company handbook with policies that prohibit insubordination and intentional failure to perform work (Employer Exhibit Seven). The claimant was made aware of the employer's policies at the time of hire and in October 2015 (Employer Exhibits Five and Six). Prior to the claimant's separation, he had two written warnings for attendance, dated February 9, 2015 (Employer Exhibit Three) and February 24, 2015 (Employer Exhibit Five). The claimant was also issued a verbal warning by his manager, Todd Atchison, on September 16, 2015, for misuse of time.

The final incident occurred on October 23, 2015, when the claimant failed to apply non-skid material to a ramp in Plant 4. When the claimant began his shift, he was instructed by Bryan Thomas and in the presence of Todd Atchison, to complete the application of non-skid material on a ramp in Plant 4, and then to a section of Plant 5. The undisputed evidence is that the claimant knew the ramp needed to be completed. Mr. Thomas and the claimant spoke in Plant 5 and identified that it should only take a few brush strokes of material to complete the ramp, and Mr. Thomas would meet the claimant after break to show him which ramp to do. The claimant interpreted the conversation to mean he could work on Plant 5 until he met up with Mr. Thomas in Plant 4. The claimant ran out of material and did not complete Plant 4. He told Mr. Thomas and requested additional paint but was not provided it. When confronted, the claimant offered to come in over the weekend or try to apply some grip tape on the ramp to hold until he returned on Monday to complete it. He was subsequently discharged on October 29, 2015 for his failure to communicate and his incompleteness of the assignment.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2070.00, since filing a claim with an effective date of November 1, 2015, through the week ending December 5, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview by way of Julia Schurman on November 18, 2015.

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(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.

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 Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

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.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds that based on the employer's internal policies, the employer had business reasons for discharging the claimant. The evidence does not establish that the claimant intentionally disregarded the employer's interests or directives. The claimant was aware that Plant 4's ramp was a priority, when the directions were provided by Mr. Thomas to apply the non-skid material. However, after that conversation, Mr. Thomas then told the claimant he could work on Plant 5 since he was there, and to meet him at Plant 4 to see the ramp afterwards. In the interim, the claimant ran out of the non-skid paint and told Mr. Thomas, who did not obtain more for the claimant. The claimant even offered to apply non-skid tape to the ramp before he left, so that it was addressed and covered until he returned on Monday and could complete the task, but was still discharged.

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 two people with any direct knowledge of the situation, other than claimant, were Todd Atchison and Brian Thomas, who did not attend the hearing. The hearsay evidence presented in this case does not overcome the credible and direct testimony offered by the claimant at the hearing. 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 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. 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 separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

Because the claimant is eligible for benefits, he has not been overpaid benefits. As a result, the issues of recovery of any overpayment and possible relief from charges are moot.

DECISION:

The November 20, 2015, (reference 01) unemployment insurance 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 benefits. The employer's account is not relieved of charges.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

jlc/pjs