IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RYAN M SCARBOROUGH
Claimant

CRESLINE PLASTIC PIPE CO INC
Employer

APPEAL NO: 18A-UI-09769-JC-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/12/18
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 September 14, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 9, 2018. The claimant participated personally. The employer participated through Elizabeth Jackson, director of human resources. Employer witnesses included Ralph Mericle, Jake Brown, Cameron George, Torrin Jackson, and Chris Wells. Employer Exhibits 1-13 were admitted into evidence. 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 was employed full-time as a compounder and was separated from employment on August 8, 2018, when he was discharged (Employer Exhibit 13).

The employer has a written anti-harassment policy, which prohibits unwelcomed comments and conduct amongst employees or conduct which makes another employee uncomfortable (Employer Exhibit 3-5). The claimant was provided a copy of the employee handbook upon his 2012 hire.

Prior to separation, the employer reported the claimant had been issued two documented verbal warnings related to language and conduct. In June 2017, the claimant was coached following a complaint by a female employee about the claimant asking her if she was dating a co-worker (Employer Exhibit 11). The claimant was also reportedly issued a verbal warning for mocking

co-worker, Torrin Jackson, by saying "yo, yo, yo" and swinging his arms making some kind of gang signs (Elizabeth Jackson and Torrin Jackson testimony). The claimant reported his comments were made after Mr. Jackson started rapping/blurting out in the break room about being the "baddest motherfucker" who could beat people up, and using the term "n----r" (Scarborough testimony). The claimant was verbally warned February 27, 2018, based upon employee, Jonathon Romero, stating the claimant had stared at him (Elizabeth Jackson testimony). The claimant disputed staring at Mr. Romero and indicated he had actually initiated a complaint to human resources about Mr. Romero, who had called him a "f----t" and "fucking bitch". In terms of the warning, the claimant stated Mr. Wells told him that he was required to address the claimant's comments and then began discussing Netflix, in a warning that lasted five or ten seconds (Scarborough testimony).

On August 2, 2018, Ms. Jackson received a written complaint from employee Jake Brown (Employer Exhibit 6). She conducted an investigation which led to the claimant's discharge. Mr. Brown reported that on July 31, 2018, near Line 4, the claimant in the presence of John Boner, said to Mr. Brown, "Nice biceps." When interviewed by Ms. Jackson, Mr. Boner "Ryan commented to me or Jake one time when we were standing together and said 'look at those biceps'" (Employer Exhibit 8). Mr. Brown also reported that at the end of the shift, in the presence of Dennis Eckman, that the claimant walked up, put his arm around Mr. Brown, and touched his chest, and rubbed his forearm (Brown testimony). When interviewed, Mr. Eckman did not confirm witnessing the alleged conduct (Employer Exhibit 9). Neither Mr. Eckman nor Mr. Boner attended the hearing. The employer did not have video surveillance of the claimant's alleged touching of Mr. Brown or any other witness.

The claimant denied commenting to Mr. Brown about his biceps on July 31, 2018. He acknowledged he had talked to employees about working out in the past, and had asked Mr. Brown if he worked out. He further denied touching Mr. Brown at all as they left their shift on July 31, 2018.

The administrative record reflects that claimant has received unemployment benefits in the amount of $467.00, since filing a claim with an effective date of August 12, 2018. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Elizabeth Jackson attended.

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 law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. Id.

Iowa Administrative Code rule 871-24.32(1)a provides:

> "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).

The employer has the burden of proof in this matter. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

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.* The administrative law judge considered the testimony of witnesses at the hearing compared to Ms. Jackson's investigative notes in evaluating consistency (Employer Exhibits 7-10) and credibility. 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(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.

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 gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. An employee has the right to work in an environment free from unwanted vulgar and threatening language, sexual propositions, lewd physical actions, and insensitive and hurtful comments. It is true that "[t]he use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even

in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990).

The undisputed evidence is that the claimant was aware of the employer's anti-harassment policy. The claimant had been verbally warned previously, and had made his own reports to the employer about inappropriate conduct in the workplace, including being called a "fucking bitch" and "f----t" by his co-worker. He credibly testified to observing a co-worker use the word "n---ger" in the workplace as well.

On July 31, 2018, the claimant and Jake Brown worked together, which resulted in Mr. Brown making a complaint against the claimant to the employer (Employer Exhibit 6). Mr. Brown alleged the claimant commented on his biceps in front of employee, John Boner, and then physically touched him, by putting his arm around him and touching his chest, while walking with Dennis Eckman. Neither witness to the final incidents participated in the hearing, and neither person's account of the day when interviewed by Ms. Jackson, aligned with Mr. Brown's complaint (Employer Exhibits 6, 8). The employer did not request a continuance to allow either witness to participate. The claimant in comparison credibly denied the conduct. It is true that if the claimant both commented and touched Mr. Brown, that it would reasonably violate the employer's anti-harassment policy. However, based on the evidence presented, the administrative law judge concludes the employer has failed to establish by a preponderance of the evidence that the claimant engaged in the conduct for which he was discharged.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to a final or current act of job related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

DECISION:

The September 14, 2018, (reference 01) decision is affirmed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

____

Jennifer L. Beckman
Administrative Law Judge

____

Decision Dated and Mailed

jlb/scn