

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

RICHARD J DRISCOLL
Claimant

APPEAL NO. 17A-UI-12767-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CONAGRA FOODS PACKAGED FOODS
Employer

OC: 11/05/17
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Richard Driscoll (claimant) appealed a representative's December 4, 2017, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Conagra Foods Packaged Foods (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 5, 2017. The claimant participated personally. The employer participated by Sarah Armstrong. The employer offered and Exhibit 1 was received into evidence.

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 November 2, 2015, and at the end of his employment he was working as a full-time machine operator. The claimant signed for receipt of the employer's handbook and the code of conduct on November 2, 2015. The employer's policies prohibit threatening behavior on company property.

On March 2, 2017, the claimant and about eight other employees were issued verbal warning for wondering why a temporary employee was placed on the Jiffy Pop line and a full-time employee was told to pick up trash. If the jobs were reversed, the line would move more smoothly. The employer notified the claimant that further infractions could result in a formal step of progressive discipline.

On September 5, 2017, the employer issued the claimant a written warning for alleged intimidating and threatening behavior. A temporary employee was knocking over boxes and spilling product. The claimant and a supervisor asked him to stop but he continued. The temporary employee yelled at the claimant that he did not have to put up with the claimant's "shit". The temporary employee continued to scream and yell at the claimant as the employee complained to the supervisor. The temporary employee made a comment about where he lived.

The claimant said, "I live in Sidney, dude". The employer thought the claimant's comment was intimidating and threatening. The claimant did not know why it was perceived as such. The employer notified the claimant that further infractions could result in termination from employment.

On October 26, 2017, the claimant was talking to co-workers in the break room before the start of the shift. The claimant did not get a lot of sleep the night before because the farmers near his home were cutting corn late at night and early in the morning. The claimant commented that he would talk to them about limiting their hours. A co-worker asserted that the farmers would not listen to the claimant. The claimant said they agreed to work fewer hours the year before after he spoke with them. The co-worker got up to leave the room and said something. The claimant asked him what he said but the co-worker did not answer. The claimant continued his conversation with others.

On November 2, 2017, the employer terminated the claimant for using profanity and threatening a co-worker on October 26, 2017. The claimant denied using profanity or threatening anyone.

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).

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). 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. The employer did not provide first-hand testimony 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. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's December 4, 2017, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs