

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARK S MOOMEY
Claimant

APPEAL NO. 12A-UI-05724-VS

LEE ENTERPRISES INCORPORATED
Employer

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 04/15/12
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated May 9, 2012, reference 01, which held that the claimant was not eligible to receive unemployment insurance benefits. After due notice, a hearing was scheduled for and held on July 11, 2012. Claimant participated. The claimant was represented by Eric Dale, attorney at law. The employer participated by Andrew Wall, human resources director; Harv Jones, commercial press supervisor; and Amber Carlson, human resources generalist. The record consists of the testimony of Andrew Wall; the testimony of Harv Jones; and the testimony of Mark Moomey. Amber Carlson did not testify.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a newspaper publisher. The claimant worked part time for the employer as an inserter. He was employed for approximately 11 years and 5 months. His last day of work was April 12, 2012. He was terminated on April 12, 2012, because the employer thought he made a sexually inappropriate comment at work.

The claimant was working the night shift on April 10, 2012, through April 11, 2012. Another employee named Charles Boyd came up to the claimant and said: "Mark, did I hear you say you wanted to give him (referring to another employee named Denny Blocker) a blow job?" The claimant did not answer. The claimant did not know who Denny Blocker was. Mr. Blocker made a complaint, which was investigated by the employer. Only Harv Jones spoke to the claimant. He asked the claimant whether anything was said about a blow job and the claimant said yes. The employer somehow concluded that this meant the claimant admitted to having made the comment. He was terminated for violation of the employer's sexual harassment policy.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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.

871 IAC 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.

871 IAC 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. An employer is entitled to adopt and enforce policies that lead to safe and harassment free workplace and can expect its employees to abide by those policies. The employer has the burden of proof to show misconduct.

There is no evidence of misconduct in this record. The claimant credibly testified that another employee, Charles Boyd, made the statement. The claimant remained quiet. What made the claimant's denial particularly credible was that he did not even know who Denny Blocker was. Mr. Blocker is the person the claimant supposedly propositioned. The employer provided no direct testimony from Mr. Blocker or Mr. Boyd and thus the only eye witness testimony to what

occurred came from the claimant. The employer's evidence is hearsay and while such evidence is admissible in administrative hearings, its probative value is extremely limited.

Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code Sec. 17A.14(1). Allegations of misconduct 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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In Schmitz v. Iowa Department of Human Services, 461 N.W.2d 603, 607-608 (Iowa App. 1990), the Court required evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test, requiring agencies to employ a "common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better evidence; (4) the need for precision; (5) the administrative policy to be fulfilled." Id at 608.

Since the employer provided no direct evidence of misconduct and the claimant's testimony was extremely credible, the employer has failed to establish misconduct. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated May 9, 2012, reference 01, is reversed. Unemployment insurance benefits are allowed provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs