

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SCOTT A FULLER

Claimant

APPEAL NO. 15A-UI-08700-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

RUDD SANITATION INCORPORATED

Employer

OC: 06/14/15

Claimant: Respondent (1)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Rudd Sanitation Incorporated filed a timely appeal from a representative's decision dated July 28, 2015, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on August 25, 2015. Claimant participated. The employer participated by Ms. Lori Prucha, Office Manager.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Scott Fuller was employed by Rudd Sanitation Incorporated from November 24, 2014 until February 16, 2015 when he was discharged from employment. Mr. Fuller worked as a full-time driver/thrower and was paid by the hour. His immediate supervisor was Brian Prucha, Shop Manager.

Mr. Fuller was discharged on February 16, 2015 based upon the employer's belief that Mr. Fuller had made an inappropriate statement in the presence of another employee, referring to Mr. Prucha's spouse as "his fucking wife."

The issue of Mr. Fuller's statement about Mr. Prucha's wife was brought to the attention of the company by another employee. When questioned about the matter, Mr. Fuller denied making the statement that had been attributed to him. During the discharge meeting, Mr. Fuller signed a document that made reference to "sexual harassment" because he had been told that if he failed to do so he would not receive his final check.

A second reason for the decision to terminate Mr. Fuller was related to attendance. Mr. Fuller had been absent from work on seven occasions during the two and one-half months that he had been employed. Of the seven absences, five were related to illness or injury and were properly reported and, therefore, were excused. The remaining two absences took place sometime before the claimant's discharge and were not the focus at the time of the claimant's termination.

Mr. Fuller denies making the statement attributed to him by the unidentified company driver. Mr. Fuller denies making an admission about the alleged statement at the time that he was being discharged.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does not.

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).

The employer has the burden of proof in establishing job disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants the denial unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not always serious enough to warrant a denial of unemployment insurance benefits. Such misconduct must be "substantial." Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

In an at will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that job separation. In the case at hand, the employer relies on hearsay from an anonymous source to establish that Mr. Fuller had made an inappropriate statement about a female company employee, and that the claimant's statement led to his termination from employment. In contrast, Mr. Fuller has provided firsthand, sworn testimony denying making the statement that had been attributed to him and denying that he had made any admissions to the employer indicating that he had, in fact, made the statement that was causing his discharge.

While hearsay is admissible in administrative proceedings, hearsay cannot be accorded the same weight as sworn, direct testimony providing the sworn, direct testimony is credible and is not inherently improbable. The administrative law judge finds Mr. Fuller to be a credible witness and finds that his testimony is not inherently improbable. The weight of evidence is, therefore, established in favor of the claimant.

A second reason given by the employer was the fact that Mr. Fuller had been absent on seven occasions during the two and one-half months that he had been employed as a probationary employee. The evidence in the record establishes that five of the seven absences were related to illness or injury and were properly reported and that no attendance infractions took place at or near the time of the claimant's discharge. The administrative law judge finds that the majority of the claimant's absences were "excused" for the purposes of the Iowa Employment Security Act because they were medically related and the absences were properly reported.

The question before the administrative law judge is not whether the employer has a right to discharge Mr. Fuller for the above-stated reasons but whether the discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate Mr. Fuller 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 intentional, disqualifying misconduct sufficient to warrant the denial of unemployment insurance benefits. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's decision dated July 28, 2015, reference 01, is affirmed. Claimant was dismissed under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs