

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

ROBERT L DETERMANN
Claimant

APPEAL NO. 18A-UI-09406-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**SYCAMORE CREEK FARMS
TRUCKING LLC**
Employer

OC: 08/05/18
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Sycamore Creek Farms Trucking (employer) appealed a representative's August 30, 2018, decision (reference 01) that concluded Robert Determann (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 26, 2018. The claimant participated personally. The employer was represented by Jamie Bosten, Attorney at Law, and participated by Dan Schurr, Owner. Exhibit D-1 was received into evidence. The claimant offered and Exhibit A was received into evidence. 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 and whether the claimant is able and available for work.

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 August 8, 2014, as a full-time driver/dispatcher. He signed for receipt of the employer's handbook when he was hired. The handbook has an ethics policy but does not contain a non-compete clause. The employer counseled the claimant on performance issues twice. It did not issue him any written warnings.

The claimant was under stress at work and in the spring of 2018, the claimant had a bad day. While at a customer's business he mentioned to the customer owner that he wished he had the money to buy his own truck. Later, the claimant and the customer owner would have communication problems. The customer owner would not answer calls or texts from the claimant. The customer owner told the employer the claimant did not call her.

On August 3, 2018, the employer told the claimant that the customer owner was upset because of communication issues and she was going to change companies. The employer asked the claimant to call her. The claimant called and sent texts to the customer owner but she would not respond to him. The claimant related this to the employer and said he was finished dealing with the customer. The claimant was frustrated and told the employer he was thinking of quitting.

On August 6, 2018, the employer called the customer owner and they agreed to meet face to face on August 7, 2018. On August 7, 2018, the customer owner told the employer that the claimant met with her in her office on an unknown date and he gave her the employer's financial information. The claimant was starting his own company and wanted her to finance him. The claimant was going to take most of the business and employees from the employer. The customer owner said she was not interested and the claimant left. Later on August 7, 2018, the employer terminated the claimant for trying to set up a business to compete with the employer. He has not been employed since his termination. The customer owner kept her business with the employer after the claimant was terminated.

The claimant filed for unemployment insurance benefits with an effective date of August 5, 2018. The employer participated personally at the fact finding interview on August 29, 2018, by Dan Schurr.

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). Although only preparing or making arrangements to enter into competition with one's employer does that employer no legally cognizable harm, soliciting fellow employees to leave their work in favor of a competitor breaches the employee's common law duty of loyalty. *Porth v. Iowa Department of Job Service*, 372 N.W.2d 269 (Iowa 1985). In this case the claimant may have been dreaming of developing his own business. He may have even said it out loud to a few people. The employer provided no credible evidence that he solicited co-workers to leave work and work for him.

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 eye witness testimony but chose not to do so. It did provide the written statement of the customer owner. The statement does not carry as much weight as live testimony because testimony is under oath and the witness can be questioned. In this case the written statement of the customer owner is suspect. The employer and claimant both testified that the claimant and customer owner had a relationship fraught with communication problems. It was difficult for them to talk on the telephone or even text. Within that context, it is a stretch to believe that the claimant would walk into the customer owner's office and ask for financing for ten tractor-trailers. Without an opportunity to question this witness, the statement is problematic. 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.

The claimant is able and available

Iowa Code section 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The claimant has the burden of proof in establishing his ability and availability for work. Davoren v. Iowa Employment Security Commission, 277 N.W.2d 602 (Iowa 1979). There was no evidence that there were any restriction or limitation on employability. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's August 30, 2018, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. The claimant is able and available for work. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs