

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DUSAN VISNJIC
Claimant

RYDER INTEGRATED LOGISTICS INC
Employer

APPEAL 17A-UI-10142-JP
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/30/17
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 28, 2017, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. An in-person hearing was held on November 2, 2017, at 3420 University Avenue, Suite A, in Waterloo, Iowa. Claimant participated in-person. Sladana Bulic attended the hearing in-person on claimant's behalf. Ljupka Poleksic appeared in-person and interpreted on claimant's behalf. On November 2, 2017, at the start of the hearing, the employer requested to participate via telephone. Pursuant to Iowa Administrative Code rule 871-26.6(4), the employer was allowed to participate via telephone with no representative present in the in-person room. Employer participated, via telephone, through human resource generalist Jamie Kramer.

The employer offered Employer Exhibit 1 into evidence. Claimant objected to Employer Exhibit 1 into evidence because the statement was not the same as Ms. Kramer's testimony. Claimant's objection was overruled and Employer Exhibit 1 was admitted into evidence. Official notice was taken of the administrative record, including claimant's benefit payment history, with no objection.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a driver from June 4, 2016, and was separated from employment on September 1, 2017, when he was discharged.

The employer has a written workplace violence prevention policy that prohibits intimidating or harassing behavior. If an employee violates this policy, they are subject to immediate discharge. Claimant was aware of the policy.

On August 24, 2017, claimant worked his scheduled shift. Claimant does not know a female coworker Ms. Whiteside. Claimant does not know a female coworker Ms. Taylor. Claimant denied touching Ms. Whiteside on August 24, 2017. Claimant denied touching a female coworker on August 24, 2017. Claimant denied running after a woman in the parking lot.

On August 29, 2017, Ms. Kramer spoke to Ms. Whiteside. Ms. Kramer testified that Ms. Whiteside alleged that claimant inappropriately grabbed her on August 24, 2017. Ms. Whiteside provided the employer a written statement that consisted of multiple pages. The employer provided only one page of Ms. Whiteside's statement for this hearing. Employer Exhibit 1. The employer also interviewed Ms. Taylor regarding the August 24, 2017 incident. Ms. Kramer testified that Ms. Taylor alleged that she saw claimant grab Ms. Whiteside. Ms. Taylor also provided the employer a written statement about the August 24, 2017 incident, but the employer did not provide Ms. Taylor's written statement to the Appeals Bureau for this hearing. Ms. Kramer testified that Ms. Whiteside and Ms. Taylor did not know claimant's name. On August 29, 2017, the employer placed claimant on paid suspension while the employer finished its investigation. Claimant's supervisor told him he was suspended, but he did not know why.

On August 30, 2017, Ms. Kramer and claimant's supervisor attempted to conduct a phone interview with claimant, but there was too much of a language barrier, so they had claimant come to the employer on August 31, 2017. On August 31, 2017, the employer met with claimant. The employer did not mention to claimant that Ms. Whiteside alleged he grabbed her breast or tried to kiss her. The employer told claimant that it was alleged he was running after Ms. Whiteside in the parking lot. The employer told claimant that Ms. Whiteside was afraid to work with claimant. Claimant does not know Ms. Whiteside and asked the employer to show her to him, but they would not show him her picture. Claimant denied Ms. Whiteside's allegations. Claimant denied touching Ms. Whiteside on August 24, 2017.

On September 1, 2017, the employer called claimant and told him he was discharged. The employer told him he was running after a woman in the parking lot. Claimant denied running after a woman in the parking lot. Claimant did not have any prior warnings for violating the employer's written workplace violence prevention policy. Claimant testified that the first time he heard he was alleged to have touched a coworker was during the fact-finding interview. Ms. Whiteside and Ms. Taylor still work for the employer, but did not testify at this hearing.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit that was admitted into evidence. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

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).

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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

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, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

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 the testimony or written statements from Ms. Whiteside and Ms. Taylor, but the employer only provided one page of Ms. Whiteside's written statement and choose to rely on Ms. Kramer's testimony about what Ms. Whiteside and Ms. Taylor told the employer during their interviews and wrote in their witness statements about what happened on August 24, 2017. Ms. Kramer's testimony as to what the Ms. Whiteside and Ms. Taylor said and wrote does not carry as much weight as live testimony because live testimony is under oath and the witness can be questioned. Ms. Whiteside's partial written statement does not carry as much weight as live testimony because live testimony is under oath and the witness can be questioned. Claimant provided credible, first-hand testimony denying Ms. Whiteside's allegations. Claimant provided credible, first-hand testimony that he did not touch or grab Ms. Whiteside. Claimant also provided credible, first-hand testimony that he did not chase a woman in the parking lot.

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 claimant's denial of said conduct. "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." Iowa Admin. Code r. 871-24.32(4). The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The September 28, 2017, (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs