IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CAREY D ROBINSON
Claimant

ELLER CONSTRUCTION CO INC
Employer

APPEAL NO. 10A-UI-08900-VS

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/07/10
Claimant: Appellant (2)

Section 96.5-2-A – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated June 16, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on July 29, 2010, in Davenport, Iowa. Claimant participated. Employer participated by Rick Eller, Owner. The record consists of the testimony of Rick Eller; the testimony of Carey Robinson; and Employer's Exhibit 1.

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 pours concrete foundations. The claimant was hired on April 23, 2009, as a full-time laborer. He was terminated on May 21, 2010, for insubordination.

The incident that led to the claimant's termination occurred on or about May 18, 2009. The employer's version of that incident is that the claimant stopped working and went to sit in a truck, despite work remaining to be done on the site. The claimant refused to resume working and exchanged words with the foreman, Jim Jepsen, which included profanity and threats. Mr. Jepsen did not testify at the hearing. The claimant denied that he refused to work or that he either used profanity or threatening language.

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Profanity or other offensive language in a confrontational or disrespectful context may constitute misconduct, even in isolated situations or in situations in which the target of the statements is not present to hear them. See Myers v. EAB, 462 N.W.2d 734 (Iowa App. 1990). In Henecke v. IDJS, 533 N.W.2d 573 (Iowa App. 1995), the Court of Appeals stated that an employer has the right to expect decency and civility from its workers and that evidence of threats could be found both in words and body language. The employer has the burden of proof to show misconduct.

If the incident described by the employer did occur on May 18, 2010, there is little doubt that it would constitute misconduct, given the profanity and threatening language used by the claimant. Mr. Eller, the owner, did not personally witness the incident and the evidence on what occurred comes from hearsay accounts given to Mr. Ellis and the written statement of Mr. Jepsen. Mr. Jepsen did not testify at the hearing. The claimant did testify at the hearing and denied that he refused to work; that he used profanity; and that he threatened Mr. Jepsen.

Because the employer's evidence of misconduct is hearsay evidence, there is insufficient evidence in this record to find misconduct. 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 requires 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.

There is no indication as to why Mr. Jepsen could not have participated in the hearing. Mr. Eller had no first-hand knowledge about this event. Although the administrative law judge has some reservation about the credibility of the claimant's testimony, there was no opportunity to weight that testimony against any other witnesses who participated in the incident or saw what happened. Since there is insufficient evidence of misconduct, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated June 16, 2010, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck
Administrative Law Judge

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Decision Dated and Mailed

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