IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TIM J FLYNN
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 10A-UI-04529-VST

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/21/10
Claimant: Appellant (2)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated March 15, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 17, 2010. Claimant participated. The claimant was represented by Matthew Nowell, attorney at law. Employer participated by Mike Terrill, administrator. The employer was represented byTom Kuiper, who is affiliated with TALX. The record consists of the testimony of Mike Terrill; the testimony of Tim Flynn; and Employer's Exhibits 1-5.

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 long-term care facility located in Dubuque, Iowa. The claimant was hired on February 26, 2009, as a full time certified nursing assistant. His last day of work was February 17, 2010. He was terminated on February 22, 2010, because the employer believed that he had used foul, abusive and offensive language on the job.

The employer received a report from a charge nurse that the claimant had said "shut the hell up" when leaving a resident's room. The nurse also informed the employer that the claimant told her that "you can fucking write me up" and that "this is a horrible place to work." These actions took place on February 17, 2010. The claimant denied making these statements when asked about them by the employer. The claimant had had a previous warning in September 2009 about his language. He was reported to have said "fucking" and he stated he said "freaking." A three-day suspension was given for that incident. Since the claimant had previously been suspended for inappropriate language, the decision was made to terminate the claimant on February 22, 2010.

The employer had a written policy that prohibited the use of foul and abusive language in the workplace. The claimant was aware of this policy as it was contained in the employee handbook.

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 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. Profanity or other offensive language in a confrontational or disrespectful context may constitute misconduct, even in isolated 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). The employer has the burden of proof to show misconduct.

There is insufficient evidence in this case to establish misconduct. The claimant was terminated for language which, if said, would constitute misconduct as the words he allegedly spoke are not appropriate in the workplace. The employer had a policy prohibiting the use of this language. Since the claimant had been previously warned concerning the use of profane language and been suspended for three days, the claimant knew his employer considered inappropriate language to be the grounds for termination. The claimant, however, denies that the events described by the employer ever took place. Sara Ball, the nurse who reported the claimant, was not present to testify at the hearing.

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 section 17A.14(1). The employer's evidence consists of hearsay allegations about the claimant's words and action on February 17, 2010. The claimant denied that he used profane language and the individual who heard those statements did not testify at the hearing. 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 Department 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.

The evidence presented by the employer in this case consisted of a hearsay report that the claimant used profane and inappropriate language on February 17, 2010. The individual who reported the information did not participate in the hearing. Mr. Terrill had no first-hand knowledge about any of these events although he did participate in the decision to terminate the claimant. Because Ms. Ball did not testify, the administrative law judge could not judge the credibility of her testimony. Accordingly, there is no credible evidence on which to base a finding of misconduct. Benefits will be allowed, if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated March 15, 2010, 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