

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID V. THOMAS
Claimant

APPEAL NO: 17A-UI-06898-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

REMBRANDT ENTERPRISES INC
Employer

OC: 06/11/17
Claimant: Appellant (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the July 7, 2017, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 25, 2017. The claimant participated in the hearing. Pam Winkle, Human Resources Administrator; Lori Graves, Shipping and Receiving Warehouse Manager; and Lori Carr, Human Resources Manager; participated in the hearing on behalf of the employer. Employer's Exhibits One through Ten were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time forklift driver for Rembrandt Enterprises from May 15, 2016 to June 6, 2017. He was discharged for threatening and harassing behavior toward a co-worker.

The claimant worked the 6:00 p.m. to 6:00 a.m. shift. At approximately 2:40 a.m. May 27, 2017, the claimant was moving a pallet and hit the wrapper, a 2,500 pound pallet size stainless steel plate on the floor where pallets are stacked to be shrink-wrapped for shipping. Employees in the area, including Maritza Kelley, looked to see what caused the loud noise and returned to work. The claimant came back with another pallet and hit the wrapper again, hard enough that it moved. Ms. Kelley and Jose Palmarin both turned to look to see what happened and the claimant became very angry with Ms. Kelley. He got off the forklift, yelling and waving his arms, and walked toward Ms. Kelley, who was about 25 feet away from him. The claimant is six foot one inch tall and weighs between 225 and 230 pounds. Ms. Kelley is five six and one-half inches tall and weighs approximately 185 pounds. He was yelling at Ms. Kelley, "What are you looking at? What the fuck are you looking at?" Mr. Palmarin was concerned for Ms. Kelley's safety because he thought the claimant was "going to swing at her" and went over to get in front of the claimant (Employer's Exhibit Two). The claimant would not calm down and said he "didn't care if she's a fucking woman" (Employer's Exhibit Two). When Mr. Palmarin was standing in

front of the claimant both he and Ms. Kelley observed the claimant put his hand on his right pocket where he kept a box cutter used for work and were concerned by that action (Employer's Exhibits One and Two). The claimant stated, "I don't give a fuck. I'll beat her like a man," (Employer's Exhibits One and Two) and "If she's going to act like a man I'm going to fight her like a man." Mr. Palmarin told Ms. Kelley to go get a radio and call the manager (Employer's Exhibit Two). She did so and Manager Shane Caraway came over and spoke to Ms. Kelley and Mr. Palmarin separately before instructing them to leave the area. He then talked to the claimant and noted Ms. Kelley and Mr. Palmerin's statements were very similar so he told the claimant he was suspended pending further investigation (Employer's Exhibit Six).

The employer met with the claimant June 1, 2017, and the claimant repeatedly referred to a "look" Ms. Kelley gave him. He stated he got off the forklift because of the way Ms. Kelley looked at him when he hit the wrapper and he wanted to "know what her problem was." The claimant agreed he was angry and that Mr. Palmarin stood between the claimant and Ms. Kelley and that he "probably" used profanity on the floor. He told the employer if his sister gave him the same look he would beat her too. On June 6, 2017, the employer notified the claimant his employment was terminated for violating the harassment policy (Employer's Exhibits Three and Five).

On May 16, 2017, the claimant went to work and saw the schedule. He had requested May 23, 2017, off but his supervisor misunderstood and gave him May 24, 2017, off. Rather than speaking to his supervisor about the situation, which was easily corrected, the claimant became angry and left the building without telling anyone. He left the property without showing his identification as required at the guard shack and ran a stop sign near that, nearly hitting another vehicle. The guard shack reported his conduct outside the plant and the employer watched the surveillance video of the incident. The employer met with the claimant May 18, 2017, and issued him a written warning (Employer's Exhibit Seven). It asked him why he behaved in that manner. The claimant disclosed he was scheduled to have a medical procedure May 23, 2017, and was concerned about that situation. The employer took that opportunity to give the claimant information on short-term disability and FMLA. The claimant also mentioned during the meeting that he did not like Ms. Kelley and did not like "how she looked at" him. He repeated that complaint several times but the employer could not get him to be more specific. The employer made arrangements so the claimant and Ms. Kelley would no longer be working on the same team. The employer felt the meeting was very productive.

On May 23, 2017, the claimant took his medical release stating he could return to work May 25, 2017, to Human Resources Administrator Pam Winkle. Ms. Winkle spoke to Shipping and Receiving Warehouse Manager Lori Graves to ask when she could get the claimant back on the schedule and Ms. Graves stated he could work May 26, 27 and 28, 2017, if he wanted but the employer stressed to the claimant he did not have to accept those hours because it was a Friday, Saturday and Sunday. The claimant happily took those hours but told Ms. Winkle he was released May 25, 2017. Ms. Winkle explained the schedule was already done as the employer did not know when the claimant would be released following his medical procedure and the claimant accepted that explanation but went home and called the corporate office to state the employer would not allow him to return to work May 25, 2017. The claimant reported for work May 26, 2017. He was placed on the same team as Ms. Kelley just for that weekend so the employer could offer him hours. In the early morning hours of May 27, 2017, the final incident occurred.

The claimant received a written warning for a no-call/no-show June 25, 2016 and a verbal warning in writing for leaving early three times in seven days without his manager's approval December 12, 2016 (Employer's Exhibits Nine and Eight).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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 proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. 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 duties and obligations to the employer. See 871 IAC 24.32(1).

While the claimant admits he got off the forklift to ask Ms. Kelley "what her problem was," he denies that he was angry, yelling, waving his arms, or using profanity. He stated that once he got off the forklift, Ms. Kelley went after him rather than him advancing toward her, and when Mr. Palmarin was standing in front of the claimant, Ms. Kelley swung at the claimant but he moved and she did not make contact with him. He did not tell the employer Ms. Kelley charged

him and swung at him when interviewed about this situation at the time of occurrence. The claimant's testimony was not as persuasive or consistent as Ms. Kelley and Mr. Palmarin's written statements taken at the time of the incident or the employer's testimony.

The claimant was upset prior to the May 27, 2017, incident, about the way Ms. Kelley looked at him but he could not specifically describe how she looked at him. Rather than dismissing the claimant's conflict with Ms. Kelley, however, the employer made arrangements so the claimant and Ms. Kelley would no longer be working on the same team. Because the claimant needed scheduled hours after his medical procedure May 23, 2017, the employer was forced to place the claimant and Ms. Kelley on the same team May 26 and May 27, 2017, when the final incident occurred.

The employer took every reasonable step to accommodate the claimant's concerns. Despite its actions the claimant lost control of himself May 27, 2017, got off the forklift and threatened Ms. Kelley. His actions violated the employer's harassment policy and his employment was terminated.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

DECISION:

The July 7, 2017, reference 02, decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn