IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MICHAEL R BURKE
Claimant

CITY OF EVANSDALE
Employer

APPEAL NO. 06A-UI-11097-SWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/29/06 R: 03
Claimant: Appellant (2)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated November 15, 2006, reference 01, that concluded the claimant was discharged for work-connected misconduct. A telephone hearing was held on December 5, 2006. The parties were properly notified about the hearing. The claimant participated in the hearing with his attorney, Linda Hall, and witnesses, Carol Wilson, Michael Wilson, Judy Floris, Marilyn Benhoff, and Cathy Anderson. John Mardis participated in the hearing on behalf of the employer. Exhibits A though G were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full-time for the employer as police chief from December 1996 to October 31, 2006. John Mardis, the mayor, was the claimant's supervisor.

Mardis suspended the claimant for three days on October 12, 2006, because he had taken a gasoline-powered washer home that had been recovered from an abandoned vehicle in 2003. The abandoned power washer had not been properly inventoried, but the claimant would not have been directly responsible for that documentation. An informal decision had been made to give the washer to the city fire department, but the fire chief expressed concern about using gas-powered equipment in an enclosed area so the power washer remained in the hallway of new public safety building. Sometime later, the janitor asked the claimant to move the power washer out of the hallway so he could clean the floor. The janitor helped load the power washer into the claimant's squad car and he took it home to store it until some use could be found for the washer. The claimant never intended to keep the power washer and never used the power washer for personal use.

After the claimant was suspended, the acting chief of police, Randy Weber, received a complaint from a female dispatcher on October 16 that the claimant had made comments of a sexual nature to her at work on October 11. He never made any comments of a sexual nature

to the dispatcher on October 11. After the complaint was made, it was investigated and the mayor determined there was enough evidence that the claimant had made the comments.

The investigation also included an allegation made by a male reserve officer that on August 5, 2006, he had observed the claimant cupping a female reserve officer's breast while he was staffing the beer tent for a local civic group during the city's summer celebration. This allegation was also untrue and the claimant did not have any inappropriate physical contact with the woman in question. The claimant was off duty and was not in uniform while he staffed the beer tent. The female officer had never complained about the claimant's conduct. The employer, however, believed the claimant had inappropriately touched the woman.

The employer had placed the claimant on administrative leave after receiving the complaint from the dispatcher. After completing the investigation, the employer discharged the claimant on October 31, 2006, for inappropriate conduct of a sexual nature and because of the incident regarding the power washer.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden to prove the claimant was discharged for a current act of work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. The claimant's testimony was very credible and was corroborated by his witnesses. The employer's evidence to the contrary was hearsay from individuals who had reason to be untruthful. The evidence strongly suggests that individuals who complained or corroborated the complaints had reason to present false or misleading information to have the claimant removed. The employer has failed to meet its burden of proof that the claimant was discharged for any current act of work-connected misconduct as defined by the unemployment insurance law.

DECISION:

The unemployment insurance decision dated November 15, 2006, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Steven A. Wise
Administrative Law Judge

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Decision Dated and Mailed

saw/css