IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CHARLES F SMITH Claimant **COMMERCIAL SERVICE INNOVATION INC** Employer	**APPEAL 19A-UI-05150-JC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/02/19** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant, Charles F. Smith, filed an appeal from the June 19, 2019, (reference 01) unemployment insurance decision that denied benefits based on his May 28, 2019 discharge with this employer. The parties were properly notified about the hearing. A first hearing was scheduled but not conducted on July 18, 2019. The hearing was postponed at the claimant's request. A second telephone hearing was held on July 29, 2019. The claimant participated personally and was represented by Erik D. Bair, attorney at law. The employer, Commercial Service Innovation Inc., was represented by Daniel Kresowik, attorney at law. Employer witnesses included Chris Jontz (vice president), Jeff Johtz (president), Juan Bustamante (manager), Eric Kellogg (service technician) and Ryan Kendall (assistant technician/laborer). Employer Exhibits A, B, C, D, E, F, G, I, J, K, and L were admitted into evidence. Employer Exhibits I and J are contained on a CD/DVD. The claimant was able to view Exhibit I but not Exhibit J. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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 began working for employer on November 13, 2017 as a full-time service technician and performed work until May 24, 2019. On May 28, 2019, the claimant was discharged by the employer (Employer Exhibit E).

The undisputed evidence is the claimant was a skilled technician with respect to heating and cooling matters, and the decision to discharge was unrelated to his ability to do the job. Rather, the employer's decision to discharge the claimant was based upon his conduct which occurred while on a client's site on May 24, 2019.

Prior to discharge, the claimant was issued a written warning on October 30, 2018, after he became agitated at a job site (Employer Exhibit B). The claimant was issued the warning after working with Ryan Kendall and became annoyed when Mr. Kendall did not follow his directive to get him a part from a certain location. Because Mr. Kendall did not follow the directive, the work was delayed. The claimant, while atop the roof of the client's building was observed by Mr. Kendall becoming abrupt and short, by way of throwing pieces of 2-3 foot plastic into the dumpster below, throwing down a filter dryer, and breaking a scale (Kendall testimony). Unbeknownst to the claimant, there were employees closely located to the dumpster who was smoking on break, and to whom Mr. Kendall had to apologize because of the claimant scaring them.

Then on March 11, 2019, the claimant was observed by another technician, Eric Kellogg, at the employer store unit. The evidence is disputed as to whether the claimant said, "I'm going to fucking destroy this" or I "can't believe they got me this fucking compressor" in response to seeing equipment left on his designated shelf. He was observed by Mr. Kellogg throwing the compressor to the ground twice, causing the box to break (Kellogg testimony). The employer met with the claimant to discuss the issue, and the claimant responded by asking Mr. Kellogg be brought in so he could face his accuser. The employer declined and ultimately decided not to discharge the claimant based on the incident, but did discuss it with him. In addition, Mr. Bustamante stated that on numerous occasions he had tried to support and coach the claimant about his demeanor and his temper, so that he could be successful (Bustamante testimony).

On May 24, 2019, the claimant was assigned to visit a local barbeque restaurant in Des Moines. He went to the location before the restaurant opened to work on a cooler located in the bar. The claimant also knew he had a deadline to complete the work, based in part when the restaurant opened and also because he had an appointment to dispute his property taxes later that morning. There were other employees in the restaurant but no other employee from Commercial Service Innovation Inc. accompanied him to the job. While working on the cooler, the claimant inadvertently spilled a container with bleu cheese dressing in it. The dressing fell onto the claimant, into his tool bag, onto the floor and nearby area.

The claimant, who is approximately 6 foot 5 inches and 370 pounds, became upset. The employer's client manager, Tony, called Chris Jontz to report how the claimant handled the incident. He reported employees coming to him because the claimant had an "outburst", and was observed throwing his tools down (Chris Jontz testimony). Two employees reported that the claimant had also aggressively thrown items into the trashcan, broke items, mumbled profanity, and declared he was "done" before leaving the restaurant and not cleaning up (Employer Exhibits F, K, L).

The claimant indicated he had become upset as he had to hand scoop out bleu cheese dressing from his tool bag into the trash can and off his tools. He also had bleu cheese dressing on his clothing and hair (Smith testimony). He left the site at 9:45 a.m. in advance of his 11:30 appointment to shower and clean up (Smith testimony.) Chris Jontz called the claimant about the client complaint and he told her, "yeah, I figured they would call". She told the claimant not to return to work that day and relieved him of his on-call assignment for the weekend (Chris Jontz testimony). He was subsequently discharged on May 28, 2019 by Mr. Bustamante, Mr. Jontz and a human resources representative.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for disqualifying job-related misconduct.

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*.

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 proof in establishing disqualifying job related 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). 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).

It is the duty of the administrative law judge as 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 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. *Id.* 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 believable evidence; 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. *Id*.

Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp*., 537 N.W.2d 695, 698 (Iowa 1995).

Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge found the cumulative firsthand knowledge of witnesses and hearsay evidence presented by the employer to be more credible than the claimant. The administrative law judge further concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In this case, the claimant was discharged for having an unprofessional outburst on a client site after previously being counseled for similar conduct. The administrative law judge recognizes that the claimant would understandably be upset when bleu cheese fell on him and his tools, on a day where he also had a pending personal appointment. However, the credible evidence presented is not that the claimant uttered a single curse word or expressed general frustration, but rather engaged in a series of actions that were aggressive and unprofessional in nature while on the client work site, including cursing, throwing down tools, and breaking items. The claimant's actions were confirmed by multiple witnesses (Employer Exhibits F, K, L), and consistent with prior conduct observed by multiple employees during his employment (Kendall, Kellogg and Bustamante testimony). The administrative law judge is persuaded the claimant knew or should have known his conduct was contrary to the best interests of the employer, in light of prior warnings and coaching. Therefore, the administrative law judge concludes the employer has met its burden of proof to establish the claimant was discharged for misconduct. Benefits are denied.

DECISION:

The June 19, 2019, (reference 01) initial 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.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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