

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**PATRICIA A MOORE**  
Claimant

**ABM ONSITE SERVICES MIDWEST INC**  
Employer

**APPEAL 16A-UI-05634-JCT**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/24/16**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the May 11, 2016, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on June 6, 2016. The claimant participated personally. Brittany McGregor, former employee, also testified for the claimant. The employer participated through Marlene Sartin, hearing representative with Employer's Edge. Jessica Fernandez and Jacqueline Sciorotta testified for the employer. Employer exhibits one through fifteen were admitted into evidence. Claimant exhibit A was also admitted into evidence. Based on the evidence, the arguments of the parties, 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: The claimant was employed full-time as a cleaner and was separated from employment on April 21, 2016, when she was discharged for insubordination (Employer exhibits four and five).

At the time of hire, the claimant was issued the employer's policies and procedures and acknowledged receipt (Employer exhibit thirteen). The employer's policies include that insubordination can be grounds for discharge (Employer exhibit fourteen). The claimant was previously issued a three-day suspension for insubordinate conduct to management on February 25, 2016 (Employer exhibits six, seven and eight) and moved to the Junction worksite. The claimant denied being insubordinate and the manager involved in the final incident did not attend the hearing. The claimant was issued three written warnings on May 12, 2015 for reportedly saying she would "fucking beat Tony's ass" if she were off the clock, for walking away after instructions were given to her by managers, Brooke Hupke and Anthony Edens, and for taking an unauthorized break (Employer exhibits ten through twelve.) The claimant refused to

sign the warnings because she did not agree with their contents or the account of what happened. The claimant acknowledged knowing her job was in jeopardy even if she did not agree with the warnings, and stated she would not have jeopardized her job by being insubordinate.

The final incident reportedly occurred on April 19, 2016, when the claimant refused to restock toilet paper when requested by her manager, Mr. Keta Ali. Further, the employer asserted that the claimant raised her voice and became belligerent, in her interactions with her manager. Mr. Ali did not attend the hearing or furnish a written statement in lieu of participation for the hearing. The claimant denied the conduct alleged and stated that on her final day there was no issue with restocking the toilet paper. Neither employer witness, Jessica Fernandez and Jacqueline Sciorotta, had first-hand knowledge of the final incident. She was subsequently discharged.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The law defines misconduct as:

1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

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.* 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 concludes that the employer has not 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 made aware of the employer's policies and expectations regarding following supervisor directives and insubordination. The claimant was also issued multiple warnings and aware her job was in jeopardy. The final incident occurred when the claimant allegedly refused to refill toilet paper on April 19, 2016, as directed by her manager, Keta Ali, and became argumentative with him about it. When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

Given the serious nature of the proceeding and the employer's allegations resulting in the claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. Mr. Ali did not attend the hearing or furnish a written statement in lieu of attendance. Neither of the employer's first-hand witnesses was present for the final incident in which the claimant reportedly refused to stock toilet paper and became belligerent to her manager, Mr. Ali. The claimant vehemently denied refusal to comply with directives or being loud or argumentative on her final day of employment. The administrative law judge finds the claimant's assertion that she would not argue because she knew her job was in jeopardy to be credible. Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. The hearsay statements offered by the employer in this case do not overcome the credible and direct testimony offered by the claimant at the hearing.

Work-connected misconduct that would disqualify the claimant from receiving unemployment insurance benefits had not been proven by a preponderance of the evidence in this case. Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

**DECISION:**

The May 11, 2016, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she 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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