

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JAMES SHEPPARD
Claimant

ABRH LLC
Employer

APPEAL 15A-UI-06105-SC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/19/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 14, 2015, (reference 02) unemployment insurance decision that denied benefits based upon the determination he was terminated for engaging in the conduct that was not in the best interest of the employer. The parties were properly notified about the hearing. A telephone hearing was held on June 22, 2015. Claimant James Sheppard participated on his own behalf. Employer ABRH LLC participated through Regional Human Resources Manager Tim Wong and Thomas Kuiper of Talx represented the employer. Claimant's Exhibit A was received and admitted into the record. Employer's Exhibits 1 through 3 were received and admitted into the record.

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 was employed full-time as a cook from April 8, 2014, and was separated from employment on April 16, 2015, when he was terminated. Claimant reported to General Manager John Dowler. The week before claimant's termination, Dowler notified Wong that he had received a report from another employee that claimant used the phrase "the Great White Power Dowler." Wong and Dowler conducted an investigation and collected an undated signed statement from employee William Leads stating he heard claimant use this phrase "on occasion." (Employer's Exhibit 1) Claimant never worked with Leads and did not know him. Wong contacted claimant who denied he made the statement and claimant was terminated for violating the anti-harassment policy by using racial slurs.

Claimant had received previous warnings about conduct. Claimant received a "Disciplinary Action Form" on May 29, 2014, regarding alleged sexual harassment. (Employer's Exhibit 3) He denied engaging in the conduct described. He also reported at that time he had been hit by a female co-worker when he did not do something she wanted and that he was being disrespected by other female co-workers.

Claimant received a "Discussion Recap Form" on October 1, 2014, addressing multiple issues including attendance, job performance, uniform and appearance standards, and inappropriate language. (Employer's Exhibit 3) There were no specific instances of inappropriate language with co-workers addressed. Additionally, claimant was told his attitude had improved and he was getting along better with other employees.

On January 26, 2015, claimant received another "Disciplinary Action Form" related to job performance issues that occurred during his shift. (Employer's Exhibit 3) Part of the noted misconduct included disrespecting co-workers when he refused to fix mistakes with the customers' food at the server's request. Claimant was placed on notice that any further disrespect toward management or other crew members would result in his termination.

In March 2015, claimant reported to Dowler he was called the "N-word" by a co-worker. Dowler did not contact Wong about the situation. No disciplinary action or investigation resulted from claimant's report of a violation of employer's anti-harassment policy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes 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(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).

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.

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).

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the individual was offered. Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. 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.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the incident under its policy.

The issue in this case is employer has not met its burden of proof to conclude claimant engaged in the conduct of which he was accused. The employee reported claimant's conduct to Dowler, but Dowler was not present to testify. The signed statement from Leads is hearsay and does not specifically identify when the alleged misconduct occurred and claimant testified he did not engage in the conduct of which he was accused.

Employer argued that this was a pattern of conduct from claimant. While the warning given to claimant on May 29, 2014 was for conduct similar to the alleged conduct that led to his termination, the following warnings were not for misconduct of the same nature and did not establish repeated negligence or deliberation.

Finally, even if claimant had engaged in the conduct of which he was accused, since the consequence was more severe than other employees received for similar conduct, the disparate application of the policy would not support a disqualification from benefits. Claimant was previously accused of sexual harassment, but was only given a written warning. More recently and more persuasively, another employee was accused of using a racial epithet, arguably more offensive than that allegedly used by claimant, but no action was taken.

DECISION:

The May 14, 2015, (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/pjs