IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

BRENT L WULFF Claimant **BEMIS COMPANY INC** Employer	**APPEAL 15A-UI-13590-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/15/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 3, 2015, (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 January 4, 2016. The claimant participated personally. Annie Wulff, wife of the claimant, also testified. The employer participated through Nina Braunner, human resources manager. No documents were offered or admitted into evidence.

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 an extrusion operation, beginning in 1979, and was separated from employment on November 11, 2015, when he was discharged for sleeping on the job.

The employer has a policy which prohibits employees from sleeping on the job, as it is deemed to be a safety violation. The policy includes discharge as a possible consequence for breaking the policy. The employer reported that the claimant had various warnings over the five years leading up to his discharge for sleeping on the job, but could not cite to any dated, and did not provide any copies as evidence for the hearing. The claimant asserted he was told a few days before the final incident that he needed to “get up and get busy so you don’t get fired” by his manager, Mark Allgood, but denied being warned verbally or in writing, prior to discharge.

The final incident occurred on November 5, 2015, when the claimant was observed by Mark Allgood at his work station, appearing to be asleep. The claimant, in his own words, “was not sound asleep” but was “resting his eyes” when Mr. Allgood verbally alerted the claimant that he needed to go to Mr. Allgood’s office for a discussion, at which time the claimant was suspended. Mr. Allgood did not attend the hearing or offer a written statement in lieu of appearance.

The claimant asserted at the hearing that he has a heart condition, which triggers his body to become tired. The claimant did not provide supporting medical documentation to the employer, or for the hearing, that his conduct on November 5, 2015 was attributed to the medical condition. He 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.

Iowa Admin. Code r. 871-24.32(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 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).

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.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer has failed to meet its burden of proof to establish the claimant was discharged for misconduct.

The final incident occurred when the claimant was perceived to be sleeping at his work station on November 5, 2015. The person who saw the claimant sleeping did not attend the hearing, and the claimant acknowledged he was not sleeping but "resting his eyes", which still is arguably not performing his job duties.

At issue though is whether the claimant could have reasonably anticipated that he would lose his job over the November 5, 2015 incident. Based on the evidence presented, the employer did not prove the claimant had been previously warned for similar conduct, either verbally or writing, and the claimant denied such warning. The employer witness, Nina Braunner, could not recall the dates or offer proof of any warning, and the claimant's manager, Mr. Allgood, did not attend the hearing. 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). Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

Therefore, based on the evidence presented, the administrative law judge concludes that the conduct for which the claimant was discharged was merely an isolated incident of poor judgment and inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or notice of a policy does not constitute adequate warning. The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established 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 December 3, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

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Jennifer L. Coe
Administrative Law Judge

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Decision Dated and Mailed

jlc/pjs