

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL A JONES
Claimant

APPEAL NO. 12A-UI-14885-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ADEL WHOLESALERS INC
Employer

OC: 11/04/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the December 12, 2012 (reference 02) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on January 22, 2013. Claimant participated. Employer participated through operations manager, Scott Forbes and delivery supervisor, Tony Russell. Employer's Exhibits 1 and 2 were received.

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 delivery driver from April 2011 and was separated from employment on November 6, 2012. Claimant delivered materials to a Northwest Mechanical work site three miles from the yard. It was raining on claimant as he handed boxes to work site plumber Jason Kaszlarich and Coopman Trucking & Excavating backhoe operator Aaron Coopman. It was claimant's first time dealing with Kaszlarich. Northwest Mechanical supervisor Pete Strupp arrived and started talking to Kaszlarich. Coopman also stopped to talk to Strupp. At that point there were two items left, a 6" x 20' and a 4" x 20' pvc pipe, which required one or two people to carry the pipe and one person to hold the door to the location where the pipe was being moved. Claimant sat in the truck cab for about five minutes to wait while it was raining and did not see Kaszlarich and Coopman return. Kaszlarich banged on the cab driver's door. Claimant got out and Kaszlarich yelled at him. Claimant got out his phone to call Russell and told Kaszlarich he was yelling at the wrong person. Kaszlarich said, "I know Tony [Russell], he's a good friend of mine." Claimant said nothing and went to help Coopman unload. Russell called claimant while he was unloading and told him to help unload. Claimant said okay but did not yell or raise his voice. He finished unloading, got in the truck and returned to work when he was confronted and fired. There had been no prior complaints or problems with claimant and he had "good" or better performance reviews in related areas.

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 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.

The employer has the burden of proof in establishing disqualifying job 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).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa 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 crux of this dispute rests upon conflicts between the testimony of Russell and claimant and the written hearsay statements of Kaszlarich and Coopman. Kaszlarich and Coopman did not make themselves available for questioning by the ALJ or cross-examination by the claimant about Kaszlarich's friendship with Russell; their discrepancies in the unloading timeline (Kaszlarich said Coopman continued to unload after he stopped to talk to Strupp, but Coopman said they both stopped unloading at the same time.); Coopman's location in relation to Kaszlarich and the truck cab when Kaszlarich knocked on the window and spoke to claimant; and their discrepancies in the timing of the completion of the unloading and Kaszlarich's confrontation of claimant. Because of this, and claimant's testimony was reasonable and consistent, his version of the events is credible where there is a dispute as to fact. Russell testified but he has some degree of bias since Kaszlarich and he are friends. This, in addition to the lack of any other complaint, problem or warning, claimant's testimony is considered wholly credible.

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, employer incurs potential liability for unemployment insurance benefits related to that separation. Waiting in the truck out of the rain for a few minutes while others, necessary for unloading the 20-foot pieces of pvc pipe, finished their conversation, was not misconduct. There is no credible evidence that claimant was verbally inappropriate with Kaszlarich or Russell. Benefits are allowed.

DECISION:

The December 12, 2012 (reference 02) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/tll