IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

KATWE S LUWANDAGA Claimant **TPI IOWA LLC** Employer	**APPEAL 14A-UI-08970-L** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/03/14** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant, Katwe (Samuel) Luwandaga, filed an appeal from the August 27, 2014, (reference 01) decision that denied benefits because of a discharge from employment. After due notice was issued, a hearing was held on October 2, 2014, in Des Moines, Iowa. Since the separation arose from the same issue, the hearing record was consolidated with 14A-UI-08969-L. Claimant participated with former coworkers Ariath Mayar and Atem Garang. Employer responded to the telephone hearing notice instructions and submitted a proposed exhibit but did not respond to the hearing notice instruction by appearing at the rescheduled in-person hearing and did not participate. Relevant portions of the proposed exhibit were read into the record but the document was not admitted to the record as there was no foundation available.

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 as a full-time non-conformance report (NCR) worker for wind turbine blades from November 12, 2012, through August 7, 2014. The employer announced down-sizing from four shifts to three shifts around July 4, 2013. Manager Alan Davis discharged Mayar and Luwandaga because of allegations about their conduct with substitute team leader Ahmed Zakaria. Although management claimed the incident was depicted on video, it was not shown to the claimant or submitted as a proposed exhibit for hearing. On August 6, Luwandaga had completed his job duties and the rest of the team had almost finished the second side of the blade. A quality assurance person asked him for help so he asked Zakaria if he could help her. Zakaria asked if there was someone else who could help her. He replied there was not and the assistance would not take more than five minutes. Zakaria gave his approval. Luwandaga returned after giving her assistance and it was a few minutes before the 12 a.m. break time. Luwandaga was standing on one side of the work table and there were other team members on the other side talking with Zakaria. Then Zakaria approached Luwandaga and told him he had not done what he was told. Luwandaga asked him what he had wanted done. Zakaria said he

had told him to clean. Luwandaga denied Zakaria had asked him to clean and mentioned that it was two minutes until break and started to walk away. Zakaria started to follow Luwandaga and cursed at him. Luwandaga told him they could go to the office to resolve the issue but Zakaria kept yelling and cursing. Mayar and Garang were in the area returning from a nearby work site about 15 feet distant. Mayar approached in an attempt to calm the situation telling them both to quit talking and go to the office. Zakaria remained upset, yelling and cursing and threatened to take them both down in the parking lot. There was no physical contact by any person although there was general gesturing as used in normal conversation. Mayar did not tell Zakaria he was on drugs and should not be team lead. Luwandaga and Mayar both backed down and left for break. Zakaria did not go to break with the rest of the team but went to the office. Coworker Ron Gohring was not in the area during the interaction and even had he been he wears ear buds to listen to music so loud that people have to tap him on the shoulder to get his attention. Gohring was the only one interviewed. Garang, who was present at the time, was not interviewed.

The week before the final incident, employees, including Mayar and Luwandaga wanted to speak with management about safety team members being overruled by team leads and supervisors when requesting personal protective equipment (PPE) be provided and required for various job duties while working with resin, which can be corrosive and a carcinogen. Team members had been instructed to hurry and get the job done without taking time for PPE. The team had lost faith in Davis so complained to the office, which upset Davis because of concern that upper management would side with employees and safety team members over team leads and supervisors. Davis had told concerned team members to do what Zakaria told them to do whether it was consistent with safety procedures or not. They were concerned about preventing chemical injuries to and getting medical attention for employees like Garang who has dermatitis to such a degree that he must work light duty away from chemicals used in regular duties. Mayar and Luwandaga were falsely accused of being “ring leaders” to a rumored strike. There is no union at the plant. Mayar and Luwandaga did not verbally attack human resources representative Dennise Schmidt or Davis. Schmidt’s timeline in the employer’s proposed exhibit is inaccurate as to timing, witness statements and quotes, and observers. The employer had not previously warned Mayar or Luwandaga their job was in jeopardy for any reason. Zakaria was not disciplined or discharged for his part in the incident. Davis is no longer employed at TPI.

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:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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.

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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). 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). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990); however, "Balky and argumentative" conduct is not necessarily disqualifying. *City of Des Moines v. Picray*, (No. __-__, Iowa Ct. App. filed __, 1986).

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).

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. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand witness reports in an unauthenticated memo, the administrative law judge concludes that Mayar's, Luwandaga's and Garang's recollection of the events is more credible than that of the employer's hearsay memo. Thus, the employer has failed to meet its burden of proof to establish misconduct. Even had the claimant done as alleged, since the consequence was more severe than Zakaria received for more severe conduct, the disparate application of the policy cannot support a disqualification from benefits. The entirety of the record also strongly and credibly suggests a pretextual and/or retaliatory reason for the separation because of the down-sizing and safety team complaints up the chain of command.

DECISION:

The August 27, 2014, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits withheld shall be paid, provided he is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

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