

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHRISTINE E ROSEN
Claimant

CITY OF NEVADA
Employer

APPEAL 16A-UI-12906-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/06/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 28, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 20, 2016. Claimant participated. Attorney Andrew Zbaracki participated on claimant's behalf. Employer did not participate.

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 police officer from March 23, 2015, and was separated from employment on November 8, 2016, when she was discharged.

The employer discharged claimant for violating its work rules: not keeping with a professional image; physical assault of an employee; and an act of harassment, either verbal or physical. Claimant testified the employer does not have an off duty conduct policy.

The employer discharged claimant because of an incident that occurred on October 23, 2016, while claimant was off duty. On October 23, 2016, claimant had an argument in her residence with her partner while she was off duty that became physical. Both claimant and her partner sustained injuries. Law enforcement was notified during the argument and responded to claimant's residence. Law enforcement started an investigation. While law enforcement was present, claimant offered to provide a written statement, but the law enforcement officers left without taking her written statement. Claimant did have a verbal conversation with law enforcement prior to them leaving, but she did not recall what she told them. On October 23, 2016, the chief of police for claimant's department told her not to report for her next scheduled shift. No criminal charges were filed on October 23, 2016.

On October 24, 2016, the employer provided claimant a letter (dated October 23, 2016) that placed her on paid administrative leave due to the criminal investigation. On October 24, 2016,

claimant asked her Sergeant what was going on, but she was not provided any details. Claimant's Sergeant did advise her that there was an internal affairs investigation. Claimant's Sergeant requested a written response from claimant about the incident. Around October 25, 2016, claimant attempted to provide the employer with her written response. Claimant's Sergeant read the document and then handed it back to claimant and told her there was no longer an internal investigation.

On November 1, 2016, after claimant had been arrested and bonded out, the employer provided her a notice of suspension. The notice also informed claimant there was an internal affairs investigation. Claimant contacted her Sergeant and asked if she was going to be interviewed. Claimant's Sergeant told her she would not be interviewed, that the employer was just going to use law enforcement's investigation. Claimant expressed concern to her Sergeant because she had not been interviewed by law enforcement about the incident. Claimant was never interviewed by the employer regarding the incident.

On November 4, 2016, the employer notified claimant that the employer was recommending termination of her employment and there would be an informal hearing on the recommendation for discharge on November 8, 2016. Claimant requested the hearing be postponed so her attorney could be present, but the employer denied the request.

On November 8, 2016, claimant attended the informal hearing. The employer asked claimant two questions (Tell us what happened? Why should the employer not terminate her?). Claimant informed the employer she would not answer the first question because she was not allowed to have her counsel present. Claimant told the employer that she is innocent until proven guilty and her voice has not been formally heard. The employer then discharged claimant on November 8, 2016. Claimant had no prior disciplinary warnings.

On November 1, 2016, claimant was criminal charged for the incident on October 23, 2016. Claimant has entered plea of not guilty to all charges and they are all still pending. The trial is currently set for February 14, 2017.

REASONING AND CONCLUSIONS OF LAW:

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

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 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). In the context of disqualification for unemployment benefits based on misconduct, the question is whether the employee engaged in a "deliberate act or omission," 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 conduct with "carelessness or negligence of such degree of recurrence as to manifest equal culpability." See Iowa Admin. Code r. 871 – 24.32(1)(a).

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. Claimant was arrested and criminally charged from an incident that occurred while she was off duty on October 23, 2016. Claimant has pled not guilty to all the charges. Claimant has not made statements admitting her involvement in the criminal activity. Claimant offered to provide the employer a written statement regarding what happened on October 23, 2016, but after reading the statement her Sergeant refused to accept it and stated there was no longer an internal investigation. After claimant was informed there was a new internal investigation, she offered to

meet with the employer, but the employer chose not to meet with her. The employer has the burden to prove disqualifying job misconduct; however, it did not present any evidence that claimant had engaged in the activities leading to her arrest. Disqualifying conduct cannot be predicated on a mere arrest unsupported by a conviction or other credible evidence of the claimant's intentional conduct. *Irving v. Emp't Appeal Bd.*, No. 15-0104, 2016 WL 3125854 (Iowa June 3, 2016)(citing *In re Benjamin*, 572 N.Y.S.2d 970, 972 (App. Div. 1991)(per curiam)). Furthermore, the incident on October 23, 2016, took place while claimant was off duty and claimant testified the employer does not have an off duty conduct policy.

While the employer may have been justified in discharging claimant, it has not met its burden of proof in establish disqualifying job misconduct. Disqualifying conduct cannot be predicated on a mere arrest unsupported by a conviction or other credible evidence of the claimant's intentional conduct. *Irving v. Emp't Appeal Bd.*, No. 15-0104, 2016 WL 3125854 (Iowa June 3, 2016)(citing *In re Benjamin*, 572 N.Y.S.2d 970, 972 (App. Div. 1991)(per curiam)). Nothing in this decision should be interpreted as a condemnation of the employer's right to discharge claimant. The employer had a right to make business decisions as it determined were in its best interests. 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 claimant's conduct leading to separation was disqualifying job misconduct. Benefits are allowed.

DECISION:

The November 28, 2016, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs