**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**PAUL K OLD**
Claimant

**SUNFLOWER ENTERPRISES INC**
Employer

**APPEAL NO. 18A-UI-06462-S1-T**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 05/20/18**
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

Sunflower Enterprises (employer) appealed a representative's June 6, 2018, decision (reference 01) that concluded Paul Old (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for June 28, 2018. The claimant participated personally. The employer participated by Jon Blair. Exhibit D-1 was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on February 10, 2014, and at the end of his employment he was working as a full-time paint station supervisor. The claimant signed for receipt of the employer's handbook on February 10, 2014. The employer did not issue him any warnings during his employment. Most employees, including the owner, used profanity at work without repercussion.

In 2016, the claimant was injured at work. He lost one finger and severely injured two others. He had five surgeries and will have at least one more. Since his work injury, the claimant feels the employer has been looking for ways to end the claimant's employment.

The first person to drive a vehicle each day is supposed to do a pre-trip inspection unless the mechanic shop okay's the vehicle for operation. The claimant formally supervised the mechanic shop and understood the procedures.

On May 18, 2018, the claimant planned to move one small barge that was not supposed to be painted to make space for others that were being painted. Larger barges were moved with travel lifts. Smaller barges were often moved with a forklift because a travel lift would not fit in smaller spaces. The claimant mapped out his route and found the path to be tight, but

unobstructed. He obtained a forklift from the mechanic shop. He asked the mechanic if the forklift was ready. The mechanic said, “100 percent”. The claimant walked around the forklift and it looked fine. The claimant loaded the barge and drove the forklift at about two miles per hour down the route. His visibility was limited.

In the short period of time since he mapped his route, someone parked a skid loader in his path. The claimant did not see it and when he bumped it, it caused some damage. The owner of the company yelled for the claimant to stop. The claimant stopped and heard the owner screaming, “What the fuck are you doing?” The owner cussed at the claimant and asked where he was going, whether he did a pre-inspection trip, and why the barge was not being painted. The claimant responded to the owner’s questions. The owner told the claimant he needed to leave. The claimant asked why he was being told to go home. The owner repeated that he needed to leave. The claimant asked if he was being suspended or terminated. The owner asked the claimant what he wanted. The claimant told the employer it was his decision. The employer told the claimant he was terminated for misuse of company property when he used the forklift to move the barge and insubordination.

The claimant filed for unemployment insurance benefits with an effective date of May 20, 2018. The employer participated personally at the fact finding interview on June 5, 2018, by Jon Blair.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual’s wage credits:
>
> 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 disqualification shall continue 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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose to provide a written statement. The statement did not carry as much weight as live testimony because the testimony is under oath and the witness can be questioned. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

**DECISION:**

The representative's June 6, 2018, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs