

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

FRANK A VAUGHN
Claimant

CENTRAL STATES PROPERTY MGMT
Employer

APPEAL 15A-UI-12929-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/18/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 6, 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 December 10, 2015. The claimant participated personally. The claimant had one witness, Eric Christensen, who is the claimant's son and former employee for Central States Property Management. Although properly notified for the hearing, the employer did not furnish a phone number for itself or representative to participate. No documents were offered or admitted.

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 a head maintenance-man and was separated from employment on October 16, 2015; when he was discharged.

Prior to the claimant's separation, he had no written warnings, and was unaware his job was in jeopardy. The claimant had recently received a \$150 gift card as a bonus in appreciation for his hard work. The final incident occurred when the claimant was called to perform work on a property with flooding. Kelly Meyer, the employer's regional manager, advised the claimant to bring in a contractor for the assignment. Upon visiting the premises, the contractor refused to go into the property; as he identified significant black mold present. He informed the claimant that it was unsafe and that specialists were needed to address the mold. The claimant had some training in his past to identify black mold but was not trained or certified to handle it. When the claimant conveyed the information from the contractor back to Ms. Meyer, she became upset with the claimant, and told him to put some primer over the walls and handle the matter. The claimant informed Ms. Meyer he felt it was unsafe and would not do it. She told him it was fine and that she would have her Nebraska maintenance team come handle it.

During the claimant's final week of employment, the Nebraska team arrived and performed maintenance on the property. On Monday of that week, Mr. Vaughn asked Ms. Meyer if he was going to be fired for not doing the work and was told no, that she understood his concerns. However, on Friday, Ms. Meyer informed the claimant he was being discharged without discussion.

The employer did not attend the hearing and did not present any written statements or documents for the hearing in lieu of participation.

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) and (8) 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.

(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.

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.

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 that the claimant was discharged for disqualifying job related misconduct. In this case, the record establishes the claimant had no prior warnings, or awareness that his job was in jeopardy when he was discharged. The final incident that triggered the claimant's discharge was the claimant's refusal to cover up black mold with primer.

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). The claimant had prior training and experience to know that black mold had to be treated differently than other maintenance situations. When he made the employer aware of the contractor's assessment of the mold, he was told to cover it up with some primer. The claimant refused, stating he believed it was unsafe for him and the property; to handle the black mold in that fashion. The employer did not attend the hearing and did not refute the claimant's testimony. 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. The claimant's refusal to perform the request of using primer to cover the black mold was reasonable under the circumstances, and not misconduct.

The employer failed to participate in the appeal hearing and, thereby, failed to present any evidence to support the allegation that Mr. Vaughn was discharged for a final or current act of misconduct. The evidence establishes that Ms. Vaughn was discharged for no disqualifying reason; Mr. Vaughn is eligible for benefits, provided he is otherwise eligible.

DECISION:

The November 6, 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.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

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