IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ERIC CHABAK
Claimant

PLUS ONE HOLDINGS INC
Employer

APPEAL NO. 14A-UI-03118-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/16/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Plus One Holdings (employer) appealed a representative's March 12, 2014, decision (reference 01) that concluded Eric Chabak (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for April 30, 2014. The claimant participated personally. The employer participated by Heather Fanizza, Director of Human Resources, and Tina Thomure, Unemployment State Consultant.

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 employer provides skilled exercise employees for a client company's exercise facility. The claimant was hired on October 4, 2010, as a full-time exercise specialist. The claimant signed for receipt of the employer's handbook on September 21, 2010. The employer told the claimant and his co-workers that people under eighteen were not allowed in the facility except on tours and there is a sign to this effect posted at the front desk. The employer's handbook does not mention the rule about the prohibition of minors in the facility.

The employer talked to the claimant about not having an intern teach for him because the intern was not certified, about leaving early without manager approval, and about always having workout classes even when only one person shows up for classes. The employer did not issue the claimant any written warnings during his employment.

On February 8, 2014, the client told the employer the claimant allowed a minor in the facility. On February 20, 2014, the employer obtained the recording of the facility. The video does not show a minor entering or working out in the facility. The employer testified the recording showed a minor of unknown age exiting the facility on February 1, 2014, with a member while the claimant was at his desk. The claimant did not remember ever seeing a minor at the facility

and was not show the recording. The employer terminated the claimant on February 21, 2014. No one who appeared at the appeals hearing had viewed the recording.

The claimant filed for unemployment insurance benefits with an effective date of February 16, 2014. The employer did not participate at the fact-finding interview on March 11, 2014. The employer did not receive a call from the fact finder.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was discharged for misconduct.

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).

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). The employer had not previously issued the claimant any written warning regarding any rule violations. An employer may discharge an employee for any number of reasons or no reason at all, 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.

Inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

The employer terminated the claimant for allowing a minor to enter a facility. By the employer's own testimony, the claimant did not allow the minor to enter. The claimant was not present when the minor entered. The employer could not see from the recording when the minor entered or where the minor went after entering. If in fact the claimant could see the minor exiting, the employer has testified the claimant did his job and had the minor leave the premises. The next question is how we do we know the minor is in fact a minor. The employer's witness was unable to tell the administrative law judge whether the minor was closer to two years old or seventeen years old. The witness had not seen the recording. If there was no minor, the claimant did not violate any rule.

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 eye witness testimony but chose not to do so. 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 March 12, 2014, decision (reference 01) is affirmed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs