IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CARLOS L RUSH
Claimant

UNIPARTS OLSEN INC
Employer

APPEAL NO. 12A-UI-02750-VS

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/05/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated March 12, 2012, reference 01, which held that the claimant was not eligible to receive unemployment insurance benefits. After due notice, a hearing was scheduled for and held on May 2, 2012, in Davenport, Iowa. Claimant participated. The employer participated by Stephanie Tuegel, human resources. The record consists of the testimony of Stephanie Tuegel; the testimony of Carlos Rush; and Employer's Exhibits 1-10.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a steel manufacturing facility located in Eldridge, Iowa. The claimant was hired on October 28, 2010, as a material handler/driver. He was a full-time employee. His last day of work was January 25, 2012. He was terminated on January 27, 2012.

The incident that led to the claimant's termination occurred on January 25, 2012. The claimant's job was to drive a truck and he and other drivers had specific routes. The claimant would load and unload at the plant in Eldridge and then make deliveries and pickups on his route. The employer wanted the claimant to learn another route and in order to learn that route, he needed to go with the driver of that route. The employer then wanted the claimant to show his route to an employee named Chuck Mulvania.

Mr. Mulvania could not legally drive the truck because he required an air brake endorsement. Mr. Mulvania did not act promptly to take the test and as a result, he did not get the necessary endorsement. The claimant had given Mr. Mulvania the information on the test and what he needed to do. The claimant could not learn the new route until Mr. Mulvania got the required endorsement. There was tension among the employees as a result of this impasse. The

claimant had also informed the employer about the conduct of Mr. Mulvania that he considered harassment based on racial grounds. The claimant is African-American.

On January 25, 2012, Mr. Mulvania asked the claimant several questions about the truck and the brakes. The claimant told Mr. Mulvania that he could get the information from Kenworth, the truck manufacturer, and the DOT. For unknown reasons, this led to a profane and vulgar outburst from Mr. Mulvania, including the use of words such as mother fucker. He then complained to the employer that the claimant had punched him in the jaw. The claimant was called in and asked to give his version of events. The claimant denied having hit Mr. Mulvania. The claimant was suspended by the employer. Mr. Mulvania filed a report with the Eldridge Police Department. The Eldridge police did not serve a complaint on the claimant. The county attorney declined to prosecute.

Stephanie Tuegel, the human resources manager, was not present on January 25, 2012. When she returned to work, she reviewed the investigation that had been done. She was not given both pages of the claimant's statement by the individuals who had investigated the situation. She made the decision to terminate the claimant.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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.

871 IAC 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.

871 IAC 24.32(8) provides:

> (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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In Henecke v. IDJS, 533 N.W.2d 573 (Iowa App. 1995), the Iowa Court of Appeals stated that an employer has the right to expect decency and civility from its workers. An employer has an obligation to provide a safe workplace for all employees. The employer has a material interest in establishing and maintaining a workplace that is free of violent behavior and harassment of any kind. The employer has the burden of proof to show misconduct.

The difficulty in this case is that the employer provided no eyewitness testimony. The employer's evidence was in the form of statements from other employees who were present at the time of the confrontation. Ms. Tuegel, who did appear personally, was not at work on the day that this happened and she relied primarily on the investigation that had been done by management in her absence. Her knowledge, therefore, is "second hand" and the statements from the employees are hearsay. The only person actually present who testified live at the hearing itself was the claimant. He repeatedly denied that he punched or hit the claimant or that he even got upset.

Hearsay evidence is admissible in administrative hearings but it has limited value when it is the employer's only evidence and the issue is misconduct. The employer has the burden of proof to show misconduct. When the only evidence is hearsay in nature, there is no opportunity for the administrative law judge to assess the credibility of the person making the statement and to weigh that testimony against the testimony of the claimant. The findings of fact in an unemployment case must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code Sec. 17A.14(1). Allegations of misconduct 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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The administrative law judge has some reservations about the claimant's testimony largely because he seemed to downplay the aggressive nature of his own acts. On the other hand, it appears that it was Mr. Mulvania who initiated the argument and provoked the claimant's aggressive response. There were on-going problems between these two workers. The employer decided for business reasons to accept Mr. Mulvania's version of events and terminate the claimant. For unemployment purposes, however, the total absence of eyewitness testimony to the event means that the employer has not met its burden of proof to show misconduct. The statements themselves are not conclusive on whether Mr. Mulvania was struck in the jaw by the claimant. The photograph, to my eye, is not conclusive.

The administrative law judge concludes that the employer has provided insufficient evidence to establish misconduct. Accordingly, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated March 12, 2012, reference 01, is reversed. Unemployment insurance benefits are allowed provided claimant is otherwise eligible.

_____
Vicki L. Seeck
Administrative Law Judge

_____
Decision Dated and Mailed

vls/pjs