

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

SALVADOR QUIROZ
Claimant

HIGBEE WEST MAIN LP
Employer

APPEAL 16A-UI-12900-JCT
**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 based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on December 21, 2016. The claimant participated personally. The employer registered witnesses Roni Ward and Alex Leon to participate in the hearing, but neither were available when called. A message was left with Courtney at the employer's location, directing the witnesses to call immediately if they wished to participate and no call was received while the hearing was conducted. The Claimant's Exhibits A and B were admitted into evidence, and Employer Exhibits 1 (documents submitted to the Appeals Bureau prior to the hearing) were also admitted. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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 sales associate in the sales department and was separated from employment on November 6, 2016, when he was discharged.

At the time of hire, the claimant was made aware of the employer's policies, including the "respect" policy which requires employees treat other employees and customers with respect at all times (Employer Exhibit 1). The claimant reported that on his last day of employment, he was pulled into a meeting and informed that two female employees had made complaints about him. The claimant acknowledged that he had reported some deficiencies in the employees' job performance when helping train, and believed the complaints were made in retaliation. It was reported that two female employees accused the claimant of repeatedly making inappropriate comments, specifically about their appearance and questioning their sex lives.

Specifically, one employee reported the claimant called her "pretty girl", called her "sexy" and asked if she called her boyfriend, "Daddy" (Employer Exhibit 1). The claimant acknowledged he had said to her once "Hi Pretty Girl" weeks before separation and then asked if it made her uncomfortable. When she said yes, he discontinued. The claimant further denied any questioning of the claimant's boyfriend but indicated she had volunteered information about him.

The claimant's other co-worker who lodged the complaint, reported the claimant had called her sexy and questioned whether she had engaged in sexual relations with a girl or with a boy and girl together (Employer Exhibit 1). The claimant acknowledged the co-worker had once asked about two pairs of shoes she was trying on and what his opinion was of them. He indicated one pair was "classy" and the other pair, which had heels, looked sexy. The claimant denied calling the co-worker sexy, only the shoes, and only after she asked for his opinion. The claimant further asserted that the co-worker volunteered that she was attracted to girls but had a boyfriend, and would comment to the claimant about various women being "hot." In response to a conversation initiated by the co-worker, the claimant advised the co-worker to be careful with her relationship if she was going to be with both a guy and girl. He denied inquiring about the specifics of her sex life. Neither employee who submitted the complaints was disciplined, only the claimant. The claimant's discharge letter referenced a verbal warning previously, which he denied (Employer Exhibit 1). Neither of the employees who made the complaints attended the hearing nor submitted any written statement or evidence.

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(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.

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. 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 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. 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).

The administrative law judge does not condone the language or conversation topics between the claimant and his female co-workers, as references to sex lives, sexual attraction and

physical appearance are not professional communications. However, the evidence does not support that the inappropriate conversations were initiated by the claimant or that the comments were made only by him. Rather, the claimant worked with two females who routinely discussed their boyfriends, initiated discussions of sexual nature, and in the case of one employee, commented on women being attractive and her being attracted to them. The claimant denied making sexual comments and after being told calling his female peer “pretty girl”, made her uncomfortable, he stopped. The administrative law judge is not persuaded this comment alone initiated by the claimant would warrant discharge. The claimant further denied ever being verbally warned or issued any warning for prior conduct leading to discharge.

The employer has the burden of proof to establish misconduct in a discharge situation. The employer did not participate in the hearing because the two employer witnesses were unavailable when called. The two people with any direct knowledge of the situation, other than claimant, were not listed as witnesses on behalf of the employer for hearing participation. No request to continue the hearing was made and no written statements of those individuals were offered. Given the serious nature of the proceeding and the employer’s allegations resulting in claimant’s discharge from employment, the employer’s nearly complete reliance on hearsay statements is unsettling. Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant’s recollection of the events is more credible than that of the employer.

Even though the claimant may have violated employer policies regarding professional and respectful communications, his female co-workers also did, and initiated the discussions of sexual nature. The undisputed evidence is that only the claimant was disciplined for his participation in the mutual, not unilateral conversations. Since the consequence was more severe than other employees received for similar conduct, the disparate application of the policy cannot support a disqualification from benefits. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer’s right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. 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 the claimant’s conduct leading separation was misconduct under Iowa law.

DECISION:

The November 28, 2016, (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. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs