IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOSEPH E TAYLOR
Claimant

ARCHER-DANIELS-MIDLAND CO
Employer

APPEAL NO. 13A-UI-10889-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/25/13
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 16, 2013, (reference 01) unemployment insurance decision that denied benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on October 21, 2013. Claimant participated with his sister Wendy Schafer, who observed. Employer participated through craft leader Joseph Paschal and Clinton plant human resource manager Bryce Albrechtsen.

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: Claimant was employed full-time as a mason for nearly seven years and was separated from employment on August 27, 2013. Shortly before lunch on August 22, new hire coworker Shane Ralston was supposed to help claimant carry materials but said he was going to use the portajohn. Ralston left the work area before claimant. Claimant did not see Ralston again for about ten minutes. Claimant spoke to a millwright in the plant before going out to the material storage area and cut behind them to go by the crane operator supervisor's trailer area to the fabrication shop hut and talked to millwrights. The back of the fabrication hut is not within surveillance camera view. In the meantime, Paschal smelled smoke about 40 feet from the other side of storage containers where he found Ralston (who was also discharged) talking on his cell phone (a work rule violation) near a tree behind storage containers in a company parking lot/storage area. He found a burning cigarette butt and a lighter on the ground on the other side of the tree where Ralston was standing. Paschal did not see claimant in the area. Claimant left the fabrication hut, went to the front of the storage area and saw Ralston in the passenger seat of Paschal's truck. The employer's business is making ethanol and there are many processes, chemicals and grain dust that are highly flammable or explosive. Cardinal rule 4.2 calls for immediate termination for violation of cardinal rule 5.2.9, smoking or possession of matches or a lighter within the plant. Paschal took the cigarette butt into the office and interviewed Ralston, who implicated the claimant. Paschal and a supervisor confronted claimant but he did not smell of

cigarette smoke. Claimant denied the allegations and was suspended pending investigation. Claimant clocks out at lunch every day and drives off company property to smoke. The employer did not provide the name or statement of the unnamed witness or a copy of the surveillance video.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa 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).

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. Mindful of the ruling in *Crosser*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon a second-hand witness and interpretation of surveillance video, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. The employer is well within its rights to discharge an employee for a first offense of smoking on company property given the potential safety risk. However, it has not met the burden of proof to establish that claimant smoked on company property that or any other day. Furthermore, there was no indication that millwrights were interviewed during the investigation to either support or refute claimant's time line. Even apart from the lack of direct evidence, claimant's habit of driving off-property to smoke off-the-clock during his lunch break was not rebutted and supports his denial of the allegation of smoking on property shortly before lunch. Benefits are allowed.

DECISION:

The September 16, 2013, (reference 01) decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed. The benefits withheld shall be paid, provided he is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs