

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CRAIG D ELLIS

Claimant

APPEAL NO. 12A-UI-08867-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABSTRACT PAINTING & DECORATING INC

Employer

OC: 06/10/12

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Craig Ellis filed a timely appeal from a representative's decision dated July 18, 2012, reference 01, which denied unemployment insurance benefits. After due notice was provided, a telephone hearing was held on November 15, 2012. The claimant participated. Participating on behalf of the claimant was Mr. Michael Tulis, Attorney, Iowa Legal Aid. The employer participated by Mr. Brett Ryan, Attorney at Law and witness, Mr. David Owens, Company President. Exhibits A, B and D-1 were received into evidence.

ISSUE:

The issue in this matter is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Craig Ellis was employed by Abstract Painting & Decorating, Inc. from October 8, 2004 until June 7, 2012 when he was discharged based upon the employer's belief that Mr. Ellis had some involvement in an assault that had occurred on June 6, 2012 and had not been truthful about the matter. Mr. Ellis was employed as a full-time painter and was paid by the hour. The claimant normally worked 7:00 a.m. until 3:30 p.m. Monday through Friday. His immediate supervisor was the company president.

On June 6, 2012 Mr. Owens, Company President, observed the claimant Craig Ellis and his cousin Clifford Ellis driving together in the claimant's truck to the far end of the company property where employees took smoke breaks. The end of the property is adjacent to a public area where employees gathered and cigarettes are sold. Subsequently Mr. Owens observed Mr. Ellis and his cousin returning from break. Later a third employee, Kevin McClain, could not be located and Mr. Owens inquired whether the claimant knew where Mr. McClain or Cliff Ellis were. The claimant responded that he did not. Later that afternoon the claimant's cousin informed Mr. Ellis that he was leaving for an attorney's appointment. In the interim the company president had been informed that Mr. McClain had been assaulted by Mr. Ellis' cousin during the break and that Mr. McClain was in the hospital receiving stitches. Mr. Owens re-asked the

claimant about why Kevin McClain was back at the facility and when Mr. Ellis again replied that he did not know, the company president alleged that Mr. Ellis was involved in the assault and stated that Mr. Ellis was "lying." Mr. Ellis was allowed to resume his work and finished the workday.

The following morning Mr. Ellis was summoned to the company offices and Mr. Owens again inquired about Mr. Ellis' involvement in the incident of the previous day. In response to Mr. Owens statements that the worker had been assaulted Mr. Ellis responded, "Ah, Kevin was lippy anyway." Whereupon Mr. Ellis was informed that he was being discharged and was instructed to turn in his keys.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge in this case is not whether the employer made a correct management decision in terminating Mr. Ellis but whether the evidence in the record is sufficient to establish intentional disqualifying misconduct on the part of the claimant. It does not.

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 this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Conduct serious enough to warrant a decision to discharge an employee may not necessarily

be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in a 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 may expose deficiency in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In this matter the employer discharged Mr. Ellis based upon the company president's belief that the claimant had acted to facilitate the claimant's cousin in assaulting a third employee off premises during a break period on the afternoon of June 6, 2012. The company president had seen the claimant and his cousin leave for the break area together and had seen the claimant and his cousin return together. When the company president received the report that the third employee was in the hospital receiving stitches and had been assaulted Mr. Ellis' cousin and the employer concluded that Craig Ellis had aided his cousin in the commission of the assault and the company president concluded that the claimant had been untruthful when he had stated that he did not know why Kevin McClain did not return to the job site after break. The company president also concluded that the claimant must have known that the assault had occurred because other individuals had stated the claimant had parked his truck next to Mr. McClain and that the claimant's cousin had joined Craig Ellis shortly after the assault. In support of that position the employer relied upon hearsay statements made by those individuals that were made to the company president who investigated the matter.

In contract Mr. Ellis appeared personally and provided sworn testimony testifying that he did transport his cousin to the break site off company premises during a break period and that the two had separated upon reaching the break area and that Mr. Ellis had no idea that the assault had occurred. The claimant testified at length as to what his activities were and who was present during the time that he was on break. The claimant further testified that he did not dispute his discharge at the time because he was told that he was being charged as an accessory to the assault, that police were present and thus he concluded no good purpose could be served by arguing the decision to terminate him that had already been made by the company president.

The question before the administrative law judge is not whether Abstracting Painting & Decorating, Inc. made a sound business decision in terminating Mr. Ellis but whether the evidence in the record essentially establishes intentional misconduct sufficient to warrant the denial of benefits. While the decision to terminate Mr. Ellis may have been a sound decision from a management viewpoint, the administrative law judge concludes that the evidence in the record is not sufficient for a finding of intentional misconduct. Although hearsay is admissible in administrative proceedings it cannot be accorded the same weight as sworn direct testimony providing that the direct testimony is credible and not inherently improbable. Although this matter was well presented the administrative law judge concludes that the evidence in the record is not sufficient to establish that Mr. Ellis knowingly assisted his cousin or that the claimant knowingly provided false information to his employer when questioned. The claimant's discharge therefore took place under nondisqualifying conditions.

DECISION:

The representative's decision dated July 18, 2012, reference 01, is reversed. The claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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