

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GARY S MACHURA
Claimant

APPEAL NO. 09A-UI-06802-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

MOSAIC
Employer

OC: 04/05/09
Claimant: Appellant (2)

Section 96.5-2-a - Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated April 27, 2009, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 28, 2009. Claimant participated. Employer participated by Angie Engrav, habilitative coordinator, and Rich Wicks, executive director. Employer was represented by Marty Young, who is affiliated with TALX. The record consists of the testimony of Angie Engrav; the testimony of Rich Wicks; the testimony of Gary Machura; and the testimony of Carol Wede.

On May 27, 2009, the Appeals Section received a fax containing documents that the employer wanted to submit as exhibits at the hearing the next day. These documents were also sent overnight to the claimant. The documents were not delivered personally to the claimant prior to the hearing. Each document was discussed with the claimant at the hearing on the record to determine if he had any objections. The documents that were received have been marked by the administrative law judge and are part of the record as Employer's Exhibits 1-6. Not all of the exhibits were received into evidence as the claimant had not seen them prior to the hearing.

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 claimant was initially hired on June 22, 2007. His job title was direct support associate. The employer provides services to individuals with disabilities. The claimant worked in one of the homes that served as a residence for these individuals. He provided support to the residents. When the claimant was hired, he was given a copy of the employee handbook. That handbook had a provision that stated that an employee may be terminated for actions that jeopardized or threatened the health, safety and welfare of any person.

On October 22, 2008, the claimant was given a written warning for sleeping during work shifts and for setting up medication too early. The claimant signed this written warning. He did not sign a corrective action documenting verbal counseling on December 11, 2008. The claimant was counseled about arguing with a co-worker in front of a client.

On March 24, 2009, an employee reported to management that the claimant came into work and talked about killing three other employees. Based on this report, the claimant was suspended on March 27, 2009. He was referred to Life Works EAP but the claimant did not complete the assessment. The claimant was then terminated on April 3, 2009 because of the threat of violence and the non-compliance with the Employee Assistance Program assessment.

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.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

A threat of violence against co-workers, particularly one where the threat is to kill those co-workers, is something that every employer must take seriously. If the claimant indeed made this threat, it would violate the employer's work rules and constitute misconduct under unemployment insurance law that would disqualify a claimant from receiving benefits. The great

difficulty in this case is that the claimant has denied making this threat. Neither Ms. Engrav nor Mr. Wicks actually heard the threat. The individual that did hear the threat and reported it to management did not testify.

Findings 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 section 17A.14(1). In administrative law, 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. 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 Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In Schmitz v. Iowa Department of Human Services, 461 N.W. 2d 603, 607-608 (Iowa App. 1990), the Court requires evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test, requiring agencies to employ a "common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better evidence; (4) the need for precision; (5) the administrative policy to be fulfilled." Id. at 608

The evidence presented by the employer in this case consisted of a hearsay report that the claimant made a threat to kill three co-employees. The individual who reported the information did not participate in the hearing. There was no indication as to why she could not have participated in the hearing. There was no opportunity for the administrative law judge to judge her credibility. The claimant denied making the threat. Under the circumstances, the administrative must conclude that the employer has failed to establish misconduct. This conclusion does not imply that the employer failed to conduct a proper investigation of the alleged threat or that the employer was unjustified in terminating the claimant's employment. All that can be said is that the employer did not sustain its burden of proof on misconduct that would disqualify the claimant from receiving unemployment insurance benefits.

DECISION:

The decision of the representative dated April 27, 2009, reference 02, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs