**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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| **DANNY L DANFORTH**<br>Claimant<br><br>**SACHS ELECTRIC CO**<br>Employer | **APPEAL 15A-UI-01634-KCT**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 01/11/15**<br>**Claimant: Appellant (2)** |

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the January 29, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 5, 2015. The claimant participated. The employer participated through Blain Waber, representative and superintendent for the employer. No documents were admitted into evidence.

**ISSUE:**

Was the claimant discharged for work-related, disqualifying 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 journeyman electrician. He began employment on January 15, 2014 and was separated from employment on January 14, 2015, when his employment was terminated.

During the weeks immediately before his employment was terminated, the claimant had a respiratory infection and was under a physician's care. When he returned to work, he continued to cough and required antibiotics, steroids and use of an inhaler. His supervisors and co-workers were aware of his coughing and use of medication. On January 14, 2015, the claimant began feeling hot and lightheaded while working high on a ladder in a hot area of the facility. He got off the ladder, went to another room, drank some water, leaned against a bench and tried to cool down. He also used his inhaler. He checked his cell-phone to see what time it was because he does not wear a watch.

Another employee, not the claimant's foreman, yelled to him and said that break time was over. The claimant explained that he did not feel well. He thought that the other employee did not have a problem with what he had done after he talked to him. He continued to feel unwell and was considering going to his supervisor about leaving the premises or going to the medical unit onsite. He used the restroom and began returning to the ladder at his worksite. The other

employee, whom the claimant did not know, reappeared and told him to follow him. The claimant was given a document indicating that he was terminated immediately for violation of company policy. He understood that it was for being on his cell phone. He was escorted offsite.

The employer has a policy against use of cellphones by nonsupervisory employees on the premises, except at break-times. The claimant had previously received a written warning about an incident in which workplace images stored on his cellphone, and sent to him from fellow-employees, ultimately appeared on social media. He removed the photographs.

The employer provided no first-hand testimony about the events of January 14, 2015. The employer had not previously warned the claimant his job was in jeopardy for similar reasons.

**REASONING AND CONCLUSIONS OF LAW:**

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

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). 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 despite continuing to employ and have access to the witness who reportedly saw the event that lead to the claimant's discharge, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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 the 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.

Iowa Admin. Code r. 871-24.32(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.

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. The claimant took a break because he was light-headed while he was on a ladder. He was recovering from an illness and still taking medication, using an inhaler, and under a physician's care, all of which the employer knew. The incidental use of a cell phone while he was trying to recover his balance is not disqualifying misconduct.

Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate, (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

**DECISION:**

The January 29, 2015, (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.

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Kristin A. Collinson
Administrative Law Judge

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Decision Dated and Mailed

kac/pjs