

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JOSEPH M SCHULER
Claimant

THE CREEK INC
Employer

APPEAL 15A-UI-12589-JCT
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 10/18/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 4, 2015, (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 2, 2015. The claimant participated personally. The employer participated through Dan Ray, Owner. Laurie Ray also participated on behalf of the employer. No documents were offered or admitted into evidence.

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 an assistant cook and was separated from employment on October 15, 2015, when he was discharged.

The employer discharged the claimant for being intoxicated on the job, for suspicions of stealing beer, and for failure to perform his job duties. The employer did not present a copy of its handbook or policies at the hearing. The claimant had no written warnings and was unaware his job was in jeopardy prior to the final incident. The employer asserted there had been verbal “consults” with the claimant on numerous occasions for losing his temper, leaving his work area without permission, for having a bad attitude and for sleeping on the job.

The undisputed evidence is that Mr. Ray began picking up the claimant for church in June 2015, in an attempt to help him get his life together. The evidence was disputed as to whether a discussion about the claimant’s drinking alcohol or his personal problems is what triggered Mr. Ray’s offer to bring the claimant with him to church.

The final incident occurred on October 14, 2015, when the claimant was performing work, and Mr. Ray was offsite. It was reported by Mr. Ray’s son, who was visiting the employer’s bar and grill, that the claimant was in a booth, laying down, appearing to be sleeping. A cell phone photo was sent to Mr. Ray. The employer also received reports that the claimant was observed

walking into the cooler, placing beer bottles in his front pockets and walking outside through the back door. The employer found multiple empty bottles outside and determined the claimant had stolen the beers, and likely was intoxicated when he was lying down in the booth. Neither Mr. Ray's son, nor any other employee who observed the claimant's conduct on October 14, 2015 attended the hearing. The employer did not administer a drug or alcohol screening to the claimant to confirm he was intoxicated.

The claimant denied stealing beer on October 14, 2015, and stated he was lying in a booth, because he was not feeling well, and needed to rest. The claimant was the only cook on duty and did not want to leave the restaurant stranded. The claimant denied having consumed alcohol before or during his shift, and denied stealing any beer. The claimant was confronted by Mr. Ray and asked how much money the claimant owed him for beer taken. The claimant denied taking any beer, and was subsequently discharged.

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(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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of

unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

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.*

The decision in this case rests upon the credibility of the parties. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for disqualifying job-related misconduct.

In this case, the claimant was discharged for allegedly being intoxicated on the job and stealing beer from the employer. The claimant denied consuming alcohol before or during his shift on October 14, 2015, and no drug or alcohol screening was performed to confirm the employer's suspicions that the claimant was not sick but intoxicated when found lying in a booth. Further, the employer asserted the claimant had likely stolen beer, which the claimant denied. 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 people with any direct knowledge of the claimant's conduct on October 14, 2015, other than claimant, did not attend the hearing. No request to continue the hearing was made and no written statements of those individuals were offered for the hearing. 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. Regardless of prior history between the parties, (both personally and professionally), the employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined. 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.

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. Since the employer has not met its burden of proof, benefits are allowed.

DECISION:

The November 4, 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. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

Jennifer L. Coe
Administrative Law Judge

Decision Dated and Mailed

jlc/css