IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BERNARD HOWARD Claimant **EXPORT PACKAGING CO INC** Employer	**APPEAL 19A-UI-07221-S1-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/18/19** **Claimant: Appellant (2)**

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Bernard Howard (claimant) appealed a representative's September 9, 2019 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Export Packaging Company (employer) for violation of a known company rule. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 3, 2019. The claimant participated personally. The employer participated by Erin Hammond, Employee Relations Manager.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 27, 2018, as a full-time painter. He signed for receipt of the employer's handbook on August 27, 2018. The handbook states, "Every employee is expected to perform his or her work properly and efficiently to meet the established standards of quality and quantity. Certain behaviors are a distraction to a well-functioning workplace and will not be tolerated. Sleeping, loafing, loitering, or roaming during assigned working hours is forbidden. In addition, horseplay disruptive behavior or any conduct that brings disrepute on Ex Pac are not allowed. The use of abusive, crude, threatening, or obscene language, gestures, or behavior is also prohibited." The employer has no written policy on employees playing music while working. It allows employees to listen to music.

On February 14, 2019, the employee relations manager talked to the claimant about professionalism issues surrounding complaints about him from a coworker. The employer told the claimant that further infractions could result in termination from employment. Later, the supervisor notified the claimant that the complaints about him were false. He told the claimant he was fine.

On August 8, 2019, the claimant walked by a co-worker at work who was listening to music with earbuds. He had a good working relationship with her and her dad. She took out her earbuds and he asked her if she listened to music like the music he was playing on his Bluetooth speaker. She listened for about twenty seconds to the beginning of "Not Today" by Don Tripp. She asked who it was and indicated she had not heard him before. The claimant had played the same thing for his supervisor earlier. The claimant continued on to the area where he painted.

When he finished, he walked over to help the co-worker and her father who were lifting heavy parts. The co-worker told the claimant that the parts were too heavy for her to lift. She said, "I can't lift that". The claimant said, "When you were hired you said you could lift up to seventy pounds". The co-worker called the claimant lazy three times for not letting her stand aside while the claimant did her work for her. The claimant responded that she was being lazy.

The three of them worked together cordially through August 11, 2019. On August 11, 2019, the employer suspended the claimant because the co-worker made a complaint against the claimant. The co-worker said the claimant held the speaker to her ear and then said, "This is what I will do to you". There were no other witnesses to support the co-worker's statement.

On August 13, 2019, the employer questioned the claimant about events that occurred on August 11, 2019 (sic). The employer asked him if he threated the co-worker or played threatening music for her on August 11, 2019 (sic). He denied the allegations. The employer terminated the claimant on August 16, 2019, for allegedly playing music for an unknown co-worker on August 11, 2019, (sic) in violation of the employer's policy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose not to do so. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's September 9, 2019, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs