

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**JASON M KEHOE**  
Claimant

**RAINING ROSE INC**  
Employer

**APPEAL 15A-UI-13368-JCT**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 11/08/15**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the November 25, 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 28, 2015. The claimant participated personally. The employer participated through Nikki Voss, Human Resources Generalist. Claimant Exhibit A was 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 a production floor supervisor and was separated from employment on November 9, 2015, when he was discharged.

The employer discharged the claimant for a final incident that occurred on November 1, 2015, and asserted the claimant both allowed an employee who was not on the clock to be on the production floor, and for touching or rubbing an employee's back. The employer also asserted the claimant was not honest during the subsequent investigation of the incident, initially denying what happened.

The employer reported that it received a complaint from employee, Amber Westmeyer, that the claimant and employee, Josh Murphy, put lotion on her back, and she told them to stop. The employer identified video surveillance confirmed the allegation. The employer investigated the incident and determined Mr. Murphy was not on the clock at the time and should not have been in the production area. The employer has no policy in writing prohibiting employees from being on the premises if not clocked in. The claimant was aware that Mr. Murphy was on the premises but believed it was related to turning in paperwork for FMLA.

The claimant admitted to patting Ms. Westmeyer's back, but denied rubbing lotion on her, nor was he aware at the time that Mr. Murphy had put lotion on her. The claimant patted

Ms. Westmeyer's back and said "Josh missed us" because Mr. Murphy used to work the same shift but moved shifts. The claimant was not shown video footage but alleged the "patting" was less than two seconds." He was aware of prior investigation of both Ms. Westmeyer and Mr. Murphy being interviewed about putting lotion on each other, but was unaware of prior disciplinary action. The claimant did not see Mr. Murphy with Ms. Westmeyer on November 1, 2015, because he was looking at his computer screen. The claimant further denied Ms. Westmeyer raising any concerns or asking him or Mr. Murphy to stop their behavior during the shift.

The claimant denied being dishonest or not cooperative with the investigation. Ms. Voss was not present for the final incident, the investigation, or a participant in the decision to discharge the claimant. Ms. Voss did not review the video surveillance of the final incident or present it as evidence for the hearing. No witnesses to the final incident or investigation participated in the hearing, besides the claimant, and no written statements were offered by the employer of those individuals.

### **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.* 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 failed to meet its burden of proof to establish the claimant was discharged for disqualifying job related misconduct.

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).

In this case, the claimant was discharged for an incident on November 1, 2015, in which he allowed an employee on the production floor and allegedly rubbed the back of a female employee. The employer admitted to having no written policy which prohibited or advised the claimant to address Mr. Murphy's presence on the production floor, when he visited and brought in documentation for FMLA. The claimant denied rubbing lotion or rubbing Ms. Westmeyer's back, or any indication that she expressed concern or requested him or Mr. Murphy to stop behaving in a certain way on November 1, 2015, in light of her subsequent report to the employer. No credible evidence was presented that the claimant was dishonest in his interview

with the employer. 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. 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 25, 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.

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Jennifer L. Coe  
Administrative Law Judge

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Decision Dated and Mailed

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