

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ROBERT L DALL-WINTHER-SPURBECK
Claimant

DIVERSIFIED SERVICES FOR INDUSTRY
Employer

APPEAL 15R-UI-12471-SC-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 12/07/14
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Robert Dall-Winther-Spurbeck (claimant) filed an appeal from the September 15, 2015, (reference 04) unemployment insurance decision that denied benefits based upon the determination Diversified Services for Industry (employer) discharged him for violation of a known company rule. The parties were properly notified about the hearing. A telephone hearing was held on December 1, 2015. The claimant participated on his own behalf. The claimant registered his witness Ken Nickle to participate in the hearing; however, Nickle did not answer the phone when attempts were made to contact him during the hearing. The employer participated through Payroll and Human Resources Beth Kirchner and Area Operations Manager Laura Roy and was represented by Hearing Representative Anna Marie Gonzalez from UC Advantage, Inc. Employer's Exhibits 1 and 2 were received.

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 Supervisor beginning on December 19, 2014, and was separated from employment on August 20, 2015. The claimant's job duties required him to supervise employees in the warehouse and he was a safety trainer/supervisor. The employer has a safety policy that prohibits horseplay when operating power industrial vehicles such as fork trucks and Raymonds.

On August 17, 2015, the claimant was training a new employee on the proper operation of a fork truck. The claimant and his trainee passed by another employee operating a Raymond. The Raymond comes equipped with a safety arm, that when lifted disables the operation of the vehicle. The claimant lifted the other employee's safety arm, causing the vehicle to come to a stop. The employee pitched forward and his face made contact with the Plexiglas windshield of the vehicle.

The claimant's conduct was observed by an employee of 3M, the employer's client with whom it contracted to provide employees. Tony McMillan, an onsite Director for the employer, spoke to the claimant about the incident that day. The following day, McMillan and Area Operations Manager Laura Roy collected a statement from the claimant about the incident and gave him a final written warning regarding the incident. The claimant explained in his statement that he engaged in this conduct in a joking manner. He also stated other employees engaged in the same or similar conduct, although none of those individuals were supervisors.

The following day, McMillan and Roy met with 3M management who expressed that the claimant was not allowed on its property any longer based on the incident and his explanation for the same. The claimant was escorted from the job site and told that someone from the Human Resources department would contact him. The claimant received no definitive answer on the status of his employment; but, his employment was ended.

The claimant was aware the employer had a safety policy addressing horseplay. In his role as supervisor, he had issued a written warning to an employee who allowed another employee to ride on his fork truck in violation of the employer's safety policy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

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(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.

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 Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

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's version to be more credible. At times during his testimony, the claimant was evasive in answering questions and contradicted himself on occasion.

The employer has an interest in maintaining a safe working environment and maintaining a good working relationship with its client. The claimant, as a supervisor and safety trainer, has a greater duty of care to the employer than the employees he supervised. The claimant's conduct on August 17th, given his position and responsibilities, was a deliberate disregard of the employer's interests. The claimant knew his conduct was a violation of the employer's policy and he failed to set a good example for the driver of the Raymond as well as the trainee whom he was training on the safe operation of vehicles. The employer did act hastily in giving him first a verbal and then a written warning, in lieu of further investigation into the issue. However, immediately after learning the client would not tolerate the claimant's conduct, it terminated his employment. The claimant's conduct is disqualifying without prior warning. Accordingly, benefits are denied.

DECISION:

The September 15, 2015, (reference 04) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/pjs