

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

CHAD M LINDSAY
Claimant

APPEAL NO: 06A-UI-10173-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

COSMOS COFFEE LLC
Employer

**OC: 08-27-06 R: 01
Claimant: Respondent (1)**

Iowa Code section 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 17, 2006, reference 02, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on November 1, 2006. Claimant participated. Employer participated through Luke Dupic, Peter Ringlaben and Don Johnson and was represented by John Brown, Attorney at Law.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full time manager from January 2, 2006 until August 7, 2006 when he was discharged. Tracey Schultz is an employee of Johnson's other business next door. On August 3, 2006, Johnson left paychecks for both businesses with Schultz. Claimant was upset Schultz gave Grace Reichert, a high school student and claimant's subordinate, her check because she had recently quit and he wanted to retrieve her uniform before issuing the final paycheck. He asked Schultz to let him deal with the Cosmos Coffee business employees in the future. Schultz became irate, saying to claimant, "Who the hell are you, you fat fucking loser?" Schultz reported to Johnson that claimant had threatened to kill her but did not file a police report. Claimant did not threaten Schultz. There were no witnesses to the conversation and Schultz opted not to participate in the hearing because she is reportedly afraid and is pregnant. She had also talked about him to others in town to the extent claimant's daughter heard of the statements at school and went home crying.

Johnson believed Schultz since she was a longer term employee and he believed claimant lied to him about being offered a job at the casino, when DeFazio, who was later learned to be a friend of Schultz, denied it to Johnson. Claimant only told Johnson they had discussed casino employment but it was not offered. Johnson also questioned claimant's credibility because Reichert told him she had never received any tips but claimant admitted he did not give her tips since she worked so few hours, took excessive amounts of time off and reported false reasons

for absences. Reichert was also upset with claimant because he did not give her as many hours as she wanted because of her attendance issues.

Claimant was questioned about a recent event after the separation that involved alcohol and a firearm in public but claimant was under extreme stress on the day his father died and he was going to shoot skeet but sat in his truck and drank alcohol. There were no charges.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 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.

871 IAC 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 Department of Job Service*, 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). 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. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants

denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa 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 section 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.

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Claimant adequately rebutted all credibility issues raised by employer. Since Dupic and Ringlaben initially provided written notarized statements and then recanted all or part of them under sworn testimony at hearing, neither witness is considered credible on behalf of either claimant or employer, but less so for the employer since the initial sworn statement was made more contemporaneously with the separation or intervening outside events or influences. Schultz, the only first hand witness against claimant did not participate in the hearing or offer the opportunity for cross-examination about her very serious allegation. Simply being pregnant is not sufficient reason to excuse her lack of participation or submission to cross-examination. Her failure to file a police report or seek police protection at the time of the alleged event also limits her credibility. Given that there is some history with Schultz meddling in the Cosmos Coffee business where she was not employed and speaking about claimant to others in the small community to the extent his daughter heard about it at school, Schultz has very apparent veracity issues as well. Since employer has the burden of proving misconduct but has not overcome claimant's clear, reasonable and credible denial of the allegations, it has not established that claimant engaged in any hostile conduct towards Schultz or contrary to the best interests of employer. Benefits are allowed.

DECISION:

The October 17, 2006, reference 02, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs