IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

BERNADETTE D DIXON
Claimant

RYDER INTEGRATED LOGISTICS INC
Employer

APPEAL NO. 18A-UI-10772-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/07/18
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Ryder Integrated Logistics (employer) appealed a representative's October 26, 2018, decision (reference 01) that concluded Bernadette Dixon (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for November 14, 2018. The claimant participated personally. The employer was represented by Edward Wright, Hearing Representative, and participated by Jenna Tate, Human Resources Representative. Exhibit D-1 was received into evidence.

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 14, 2017, as a full-time material handler/loader. The claimant signed for receipt of the employer's handbook on August 12, 2017. The employer has a policy that prohibits harassment, discrimination, and retaliation. Harassment and retaliation were not defined terms in the policy. An employee may be terminated for fighting or serious breach of acceptable behavior.

At some point co-worker Develyn Wilder asked the claimant for help with regard to an Equal Employment Opportunity Commission filing she had against the employer. Ms. Wilder wanted the claimant to write a statement to support her complaint. The claimant was concerned for her future employment and declined the request.

In February 2018, the claimant was being sexually harassed by a co-worker and complained to Ms. Tate. The co-worker eventually grabbed her body and would not release her. She raised her voice and said, "Take your f**king hands off me". The claimant reported the incident to the

Ms. Tate. Two weeks later, on February 19, 2018, the claimant asked Ms. Tate what was being done about her complaint of sexual assault. Ms. Tate told her it was confidential. The claimant asked for the corporate number. Later on February 19, 2018, the claimant's supervisor issued the claimant a final written warning for yelling and using profanity while she was being sexually assaulted at work. The claimant refused to sign the warning. The supervisor told her it would go on her record whether she signed it or not. This was the claimant's first warning. The employer notified the claimant that further infractions could result in termination from employment.

On October 9, 2018, the claimant noticed a damaged item was brought to her to load on a truck. She followed procedures and called a supervisor. The supervisor took a picture of the item. The item had been picked by co-worker Tracey Kerns. By the time the claimant arrived at work on October 10, 2018, Ms. Kerns had been reprimanded and workers told Ms. Kerns that the claimant was responsible for the reprimand. At least three people, including a supervisor, approached the claimant when she punched in on October 10, 2018, to tell her that Ms. Kerns had been talking about her in relation to her reprimand.

The claimant walked to Ms. Kerns to tell her that her information was wrong and to stop talking about her. The claimant did not threaten Ms. Kerns or use profanity. Both women raised their voices and many workers heard the conversation. A lead worker, Dawn Hernandez, overheard the two and stopped the conversation. Ms. Tate took the statements of Ms. Hernandez, Ms. Kerns, and Ms. Wilder. Ms. Tate suspended the claimant and did not take her statement. Ms. Kerns and Ms. Wilder, who were friends, both said the claimant called Ms. Kerns a "bitch" and threatened her. Lead Hernandez did not hear any profanity or threat. On October 12, 2018, Ms. Tate terminated the claimant for using profane language and threatening a co-worker. She told the claimant she had six witness statements.

The claimant filed for unemployment insurance benefits with an effective date of October 7, 2018. The employer participated personally at the fact finding interview on October 25, 2018, by Jenna Tate.

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.
>
> 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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and 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.

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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). 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 to provide three written statements of the six statements. The statements do not carry as much weight as live testimony because the testimony is under oath and the witness can be questioned. 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.

In addition, the employer provided numerous pages of its handbook as evidence. None of the pages relate to the reason the claimant was terminated. The employer's witness was unable to cogently indicate a section of the handbook that applies to the reason for the claimant's discharge. The claimant may have been terminated for using profanity but the employer did not

cite any policy prohibiting profanity. She may have been terminated for harassment but the employer's policy does not have a definition of harassment. Clearly, the employer sent the message to the claimant in February 2018, that victims of assaults would be punished with written warnings if they used profanity to fend off an attack, raised their voices to fend off an attack, or complained about the handling of their case.

It is understood that the claimant had a disagreement with a co-worker. It appears the co-worker was retaliating against the claimant because she received a reprimand and inciting other employees to confront the claimant. Ms. Tate did not investigate the reason for the conversation between the two women. She never questioned the claimant or asked for her statement before the termination. The employer did not meet its burden of proof to show misconduct. The claimant's behavior was an isolated incident and a good faith error in judgment. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's October 26, 2018, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs