IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRANDON M PRICE
Claimant

TPI IOWA LLC
Employer

APPEAL NO. 09A-UI-15503-VST

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/13/09
Claimant: Appellant (2)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated October 6, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on November 17, 2009. Claimant participated. Employer participated by Terri Rock, human resources manager. The record consists of the testimony of Brandon Price and the testimony of Terri Rock.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer manufactures wind blades for wind turbines. The claimant was hired on July 2, 2008, as a full time manufacturing associate. He was terminated on September 18, 2009, for violation of the employer's anti-harassment policy. The employer had received some complaints that the claimant and another employee where whistling. One individual, who was gay, felt these whistles were directed at him and he felt intimidated. Another associate told the human resources manager, Terri Rock, that she had told the claimant to stop and that what they were doing was neither funny nor cute. A female vendor and two female visitors also were present when the whistling was done. The employer decided to terminate both the claimant and his co-employee for violation of the employer's anti-harassment policy since the whistles had been heard on two different days.

The claimant and his fellow employee used the whistle to get each other's attention. The whistle was not directed at other employees. The claimant was not aware that he had offended anyone and no one asked him to stop.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Profanity or other offensive language in a confrontational or disrespectful context may constitute misconduct, even in isolated situations or in situations in which the target of the statements are not present to hear them. See Myers v. EAB, 462 N.W.2d 734 (Iowa App. 1990). Every employer has the right to expect decency and civility from its workers. Evidence of threats can be found in both words and body language. Henecke v. IDJS, 533 N.W.2d 573 (Iowa App. 1995)

In this case the claimant was terminated because co-employees believed that his whistling was directed at other employees, particularly women and a gay worker. The claimant testified that he used the whistle to get his co-worker's attention and that it was not directed at any other employee or visitor to the work site. None of the individuals who heard the whistle or reported the whistle testified at the hearing. The claimant denied having been told by a co-worker to stop whistling. The individual who told the claimant to stop also did not testify at the hearing. The employer's evidence is therefore hearsay on what these individuals heard, said and perceived.

Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code section 17A.14(1). Because of the nature of the evidence produced at hearing, the employer is unable to show misconduct.

Allegations of misconduct 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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In Schmitz v. Iowa Department of Human Services, 461 N.W. 2d 603, 607-608 (Iowa App. 1990), the Court requires evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test, requiring agencies to employ a "common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better evidence; (4) the need for precision; (5) the administrative policy to be fulfilled." Id. at 608.

The evidence presented by the employer in this case consisted of hearsay reports that the claimant repeatedly whistled at co-workers in an offensive manner. The individuals who reported the whistling and heard the whistling did not participate in the hearing. There is no indication as to why they could not have participated in the hearing. Ms. Rock had no first-hand knowledge about any of these events although she did conduct an investigation. The administrative law judge had no opportunity to judge the credibility of the individuals interviewed by Ms. Rock and could not weight their testimony against the testimony of the claimant. Accordingly, there is no credible evidence on which to base a finding of misconduct. Benefits will be allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated October 6, 2009, reference 01, is reversed. Unemployment insurance benefits are , provided claimant is otherwise eligible.

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Vicki L. Seeck
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs