

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

RICKY HUNTER
Claimant

MITTERA CREATIVE SERVICES LLC
Employer

APPEAL 16A-UI-07185-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/05/16
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 21, 2016, (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 July 18, 2016. The claimant participated personally. The employer did not register a phone number for itself or representative to attend the hearing. No written statement or documentation was furnished to the Appeals Bureau in lieu of attending the hearing. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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 color corrections specialist beginning in 1994 and was separated from employment on June 3, 2016, when he was discharged.

At the time of hire and throughout employment, the claimant received a copy of the employer rules and completed online training regarding the employer's anti-harassment policy. The claimant received two warnings during employment involving the use of the word "lesbian" in a conversation in the workplace and for an employee reporting the claimant took an unauthorized photo of an employee, which the claimant denied. The dates of the warnings were not furnished.

The claimant worked with a newer employee, named Kaitlyn, on a frequent basis. When the co-worker began her employment, approximately one year before discharge, she shared with the claimant that she was homesick. In response, he offered to send her limericks or poems to make her smile and she agreed. The claimant also sent these poems and limericks to other employees. The content of the limericks were not work related or sexual in nature, and at the hearing, the claimant cited to one example of a rhyme involving a fisherman who went fishing

and hooked himself. Kaitlyn would respond with comments like “cute” or “funny.” The claimant was unaware Kaitlyn was uncomfortable in any way and did not send the poems outside of work, even though they were “Facebook friends.” On May 31, 2016, the claimant was confronted by the employer and told to stop sending the poems to Kaitlyn because she was uncomfortable. The claimant asked to apologize to her and was told not to discuss the complaint or apologize to her. The claimant was not removed from the assignments they worked on together, or offered any other directive by the employer. Within minutes of the discussion, the claimant accidentally sent a poem to Kaitlyn that had been in his queue. The claimant later went to Kaitlyn’s desk to discuss the project they were working on but did not reference the warning or apologize. The claimant had historically walked to Kaitlyn’s desk with questions historically and without issue. On June 3, 2016, the claimant was informed that he was being discharged for harassment.

The employer did not attend the hearing or offer any statement or documents in lieu of participation.

The employer did not attend the hearing, or furnish a written statement or documentation in lieu of participation.

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.

In an at-will employment environment 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, it incurs potential liability for unemployment insurance benefits related to that separation. Misconduct for this purpose is defined as

The law defines misconduct as:

1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
3. 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 do not amount to work-connected misconduct. 871 IAC 24.32(1)(a). Misconduct “must be substantial” to justify the denial of unemployment benefits. *Lee*, 616 N.W.2d at 665 (citation omitted). “Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits.” *Id.* (citation omitted).

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.* Assessing the credibility of the witness and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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.

At the time of the claimant’s discharge, he was informed it was due to harassment. In this case, the employer did not attend the hearing, and did not furnish any evidence with regard to the reason for the claimant’s discharge, or refute his testimony. The credible evidence presented does not establish that the claimant had ever been warned to not have any contact with Kaitlyn, or that he could not talk to her about work related matters, as he had throughout employment.

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). The employer did not attend the hearing or present any evidence to refute the claimant’s testimony. The claimant denied engaging in harassing conduct or wrongdoing after being warned on May 31, 2016. The administrative law judge is not persuaded the claimant’s going to Kaitlyn’s desk to discuss work matters as he

previously had, would constitute misconduct in the absence of a directive to stop doing so. Mindful of the ruling in *Crosser, id.*, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. While the employer may have had business reasons to discharge the claimant, it has not established that the claimant was discharged for misconduct for purposes of unemployment insurance benefits under Iowa law. Benefits are allowed.

DECISION:

The June 21, 2016, (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.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/pjs