IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRANDON M COTTRELL
Claimant

MERCY HOSPITAL
Employer

APPEAL NO. 10A-UI-08133-S2T

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 04/18/10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Mercy Hospital (employer) appealed a representative's May 26, 2010 decision (reference 01) that concluded Brandon Cottrell (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 22, 2010. The claimant participated personally. The employer participated by Jenni Grandgeorge, Human Resources Business Partner; Tracy Platz, General Diagnostic Manager; and Monica Reed-Tremmel, General Diagnostic Manager.

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 having considered all of the evidence in the record, finds that: The claimant was hired on August 3, 2009, as a full-time Radiologic Technician 1. The employer's handbook was available online. The employer issued the claimant verbal warnings on October 28, and December 22, 2009, and March 8, 2010. On or about April 10, the employer gave the claimant an excellent evaluation.

On April 19, 2010, a co-worker complained to the employer that the claimant called his co-workers "fucking cunts." The employer suspended the claimant on April 20, 2010, for unprofessional behavior and making derogatory comments toward women. The claimant wrote a letter of apology without knowing what he said that was derogatory. On April 22, 2010, the employer terminated the claimant. At that time, the employer told the claimant the alleged comment. The claimant did not use the offending language to refer to his co-workers. The co-worker did not appear at the hearing to testify.

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:
>
> 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.

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). 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 not to do so. The employer did not provide firsthand testimony at the hearing and, therefore, did not provide sufficient eyewitness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's May 26, 2010 decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/kjw