IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DERRICK ZEMAN
Claimant

HI-EIGHT INC
Employer

APPEAL NO: 09A-UI-18853-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11-15-09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 7, 2009, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on February 24, 2010. The claimant participated in the hearing. Larry Jensen, General Manager and Debra Erwin, Bookkeeper, participated in the hearing on behalf of the employer. Employer's Exhibits One through Four were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time bellman for Holiday Inn Downtown from September 27, 2008 to November 15, 2009. The employer testified the claimant "blurted out" foul language in front of staff and guests, including saying, "Where the fuck do you think you are going?" to Bookkeeper Debra Erwin when she was leaving one day. The employer could not provide any dates when the claimant used profanity and did not issue any warnings to him about his language. The claimant testified he was in a car accident three years ago and suffered frontal lobe damage and as a result lost some of his ability to monitor what he says and does. He admitted he did use profanity on occasion and then would apologize to Ms. Erwin for his language. On August 1, 2009, the employer took an employee call in report and the claimant told his manager August 2, 2009, he did not work that day because he was "too tired from working his other job" (Employer's Exhibit Four). He received approximately six warnings about calling in and all but the one above were due to properly reported illness. A guest complained (no date provided) that the claimant told him he needed to return the cart to the front desk area himself (Employer's Exhibit Three). The guest was in his 80's and did not believe he should be responsible for returning the cart (Employer's Exhibit Three). The claimant testified he did not know he was supposed to return the carts and he told the guest he could take the cart back to the front desk if he wanted or leave it in the hallway and the claimant would pick it up during his hourly rounds. On November 5, 2009, the claimant asked his supervisor if the employee who

was relieving him at 3:00 p.m. could tear down the overflow room so he had something to do and his supervisor indicated that would be fine. When the other employee came in he seemed "really mad" and was throwing things around the room because he was asked to tear down the room. The claimant feared the other employee was going to hit him and left the room. He went to talk to the employee who was working in front and told him he hoped the other employee hit him because "that guy never does his job" and the claimant would be able to hit him back if the other employee threw the first punch and the other employee would be discharged. The employer issued the claimant a written warning and stated he was being discharged for threatening to "punch another bellman in the mouth for not doing his job" (Employer's Exhibit Two). His employment was not terminated at that time. On November 7, 2009, the claimant received a written warning after a 17-year-old girl complained to a manager that the claimant made "unwanted advances" and stared at her (Employer's Exhibit One). The warning stated that the next step in the process for a "repeated infraction" would be termination and also indicated if the claimant retaliated against the girl he would be discharged (Employer's Exhibit One). The claimant testified he did not remember looking at anyone inappropriately and he had no intention of doing so. He also stated on the warning he wished he could apologize 'if they think I was' (Employer's Exhibit One). The employer terminated the claimant's employment November 15, 2009.

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 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 proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). While the employer made allegations against the claimant, it only had one date of his "several" absences as the other absences were due to properly reported illness and the employer did not warn him about "blurting out foul language in front of guests and staff" or record the dates it was alleged to have occurred "over a period of time." Although the employer downplayed the claimant's traumatic brain injury, it is not unreasonable to believe he could be unaware he looked at a female co-worker inappropriately, was unable to control his use of profanity at all times, and did not believe he violated the employer's policy by saying he wished another employee would throw the first punch so he could hit him back. He was not saying he planned to start a fight and he walked away earlier when there was the potential for a physical confrontation. The last incident that caused the employer to decide to terminate his employment was the "threat against another bellman". The claimant's testimony sufficiently explained that incident. Under these circumstances the administrative law judge concludes the employer has not provided enough evidence, documented dates and/or warnings for some of the situations it described, or that the last incident was enough to establish disqualifying job misconduct as defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The December 7, 2009, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

_____
Julie Elder
Administrative Law Judge

_____
Decision Dated and Mailed

je/css