

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LARRY J FRITZ

Claimant

APPEAL NO. 11A-UI-04371-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WASHINGTON COMMUNITY SCHOOL DIST

Employer

OC: 02/27/11

Claimant: Appellant (2)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Larry Fritz, filed an appeal from a decision dated March 25, 2011, reference 01. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on April 27, 2011. The claimant participated on his own behalf. The employer, Washington Community School District (Washington), participated by Business Manager Jeff Dieleman.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Larry Fritz was employed by Washington from September 11, 2006 until February 23, 2011 as a full-time custodian. He had been given an evaluation in January 2010 by Principal Curt Mayer which was generally satisfactory but indicated he did need to improve his attitude, work quality and initiative. In May 2010, he was recalled after a layoff and given a notice which expressed some of the employer's concerns about the quality of his work and his relationship with the rest of the custodial staff. The employer's witness could not say whether any follow up was done on either of these documents to determine if improvement was made.

The claimant was suspended January 26, 2011, by Superintendent Mike Jorgensen because the assistant principal of the junior high school, Aaron Six, reported he had found Mr. Fritz sleeping in the kitchen of the school. The claimant admitted he was sitting on a stool and had his head down on the counter in the kitchen because his head hurt. He was waiting for a bucket of water to fill in the sink so it could be poured down a floor drain, which was part of his job duties.

The claimant appears to be under the impression Dr. Jorgensen fired him on that date but the superintendent does not have authority to fire employees without the approval of the school board. A document notifying the claimant of the proposed recommendation to discharge and a notice of his opportunity to be heard at the school board meeting on February 23, 2011, was

given to him, although he denied it. He did admit he was told by the superintendent he would be paid until that date. He was on paid suspension until the school board meeting at which he did not appear to defend himself. The school board approved the recommendation to discharge.

REASONING AND CONCLUSIONS OF LAW:

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.

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 to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). There must be a current, final act of misconduct which precipitates the decision to discharge before disqualification may be imposed under the provisions of 871 IAC 24.32(8). In the present case the alleged final incident was sleeping on the job. The claimant denied it and the employer has failed to provide the only eye witness to testify at the hearing to rebut the claimant's denial.

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 administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The employer has not carried its burden of proof to establish that the claimant committed any act of misconduct in connection with

employment for which he was discharged. Misconduct has not been established. The claimant is allowed unemployment insurance benefits.

DECISION:

The representative's decision of March 25, 2011, reference 01, is reversed. Larry Fritz is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs