

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER J PARKER
Claimant

APPEAL NO. 13A-UI-01835-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA PHYSICIANS CLINIC MEDICAL
Employer

**OC: 01/13/13
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the representative's decision dated February 8, 2013, reference 01, which held that the claimant was not eligible for unemployment insurance benefits. After due notice was issued, a hearing was held by telephone conference call on March 13, 2013. The claimant participated personally. The employer participated by Jody Miller, the clinic administrator, and Christine Brown, the human resources business partner. The record consists of the testimony of Jody Miller the testimony of Christine Brown; and the testimony of Jennifer Parker.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge makes the following findings of fact:

The employer is a health care clinic located on the south side of Des Moines, Iowa. The claimant was hired on October 7, 2010, as a full-time clinical assistant with the radiology department. Her last day of work was January 9, 2013. She was terminated on January 11, 2013, for unacceptable behavior and conduct.

The events that led to the claimant's termination began on January 3, 2013. The claimant had a disagreement with another member of the staff. During the disagreement, the claimant became very loud and swearing in the hallway, using the word "fuck" and this "fucking place." This incident led to a written write up, which was given to the claimant on January 8, 2013.

On January 9, 2013, the employer received concerns from several employees about things that the claimant had supposedly said following the write up. According to these concerns, the claimant had said something about slashing tires and punching people in the eye. None of the complainants was identified by name by the employer and none of them testified at the hearing. The employer decided to terminate the claimant over concerns for safety. The employer has a

zero-tolerance policy for violence in the workplace. The claimant denied every making any threatening comments to anyone following the write up.

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. The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. The employer did not provide sufficient evidence to sustain its burden of proof on misconduct. It is important to note why the claimant was terminated. She was terminated because the employer received information that she was making threatening comments about slashing tires and punching people in the eye. The claimant denied making those comments. The employer provided no direct evidence on who heard the threats; what they heard; and when they heard it. The individuals who felt threatened were not even identified, much less produced as witnesses at the hearing. The administrative law judge can understand why the employer might be reluctant to call these individuals as witnesses. But absent direct evidence of misconduct, the employer cannot sustain its burden of proof.

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 Sec. 17A.14(1). 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 required 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 claimant testified that she did not threaten anyone following her write up. This was sworn testimony. The employer did not provide any direct evidence to counter the claimant's testimony. The administrative law judge therefore had no ability to weigh the credibility of the claimant's testimony against testimony from individuals who actually heard her make the threats. Because the employer has not provided sufficient evidence of misconduct, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The unemployment insurance decision dated February 8, 2013, reference 01, is reversed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css