

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICK L LOUCKS
Claimant

APPEAL NO. 11A-UI-12340-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

UNIPARTS OLSEN INC
Employer

**OC:08/21/11
Claimant: Respondent (1)**

Section 96.5-2-A – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated September 16, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on October 13, 2011. Claimant participated. Employer participated by Stephanie Bergman, Human Resources Coordinator. The record consists of the testimony of Stephanie Bergman; the testimony of Nick Loucks; and Employer's Exhibits 1-16.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer does steel manufacturing primarily for John Deere. The claimant was hired on November 5, 2004. He was a full-time CNC machinist. The claimant's last day of work was August 26, 2011. He was terminated on August 27, 2011.

On August 24, 2011, the employer received a complaint from a female employee. This employee told the employer that the claimant made a comment to her on August 23, 2011, that "her nipples must be hard." The employer investigated the complaint and terminated the claimant for violation of its sexual harassment policy.

On August 23, 2011, it was raining. The claimant and two other employees were smoking inside the building because of the rain. The claimant only saw the back of the female employee. He made a comment that it was "a bit nippy". He was referring to the weather.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Profanity or other offensive language in a confrontational or disrespectful context may constitute misconduct, even in isolated situations or in situations in which the target of the statements is no present to hear them. See Myers v. EAB, 462 N.W.2d 734 (Iowa App. 1990). In Henecke v. IDJS, 533 N.W.2d 573 (Iowa App. 1995), the Iowa Court of Appeals stated that an employer has the right to expect decency and civility from its workers. The employer has the burden of proof to show misconduct.

The claimant was terminated because the employer believed he made comment to another employee about her hard nipples. The claimant adamantly denied making that statement. He said it was raining and cool outside and he and some other employees were inside smoking. As part of a conversation on the weather, he said that it was a bit nippy out there. The claimant

was the only person to provide sworn testimony on what was said that day. The individual who made the complaint and the witnesses who allegedly heard the comment did not testify at the hearing. Mr. Bergman did not hear the complaint. She was the only witness for the employer.

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 evidence presented by the employer in this case consisted of hearsay. The individual who reported the claimant's statement did not participate in the hearing. There is no indication as to why they could not have participated in the hearing other than the fact that she no longer worked for the employer. The administrative law judge had no opportunity to evaluate the credibility of her testimony. None of the witnesses who supposedly corroborated the complaint testified at the hearing even though they are still employed by the employer. Accordingly, there is no credible evidence on which to base a finding of misconduct. Benefits will be allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated September 16, 2011, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css