

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

TIMOTHY J BULECHECK
Claimant

APPEAL NO. 19A-UI-04057-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

POLY VINYL ROOFING LLC
Employer

OC: 01/20/19
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Poly Vinyl Roofing (employer) appealed a representative's May 7, 2019, decision (reference 01) that concluded Timothy Bulechek (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 12, 2019. The claimant participated personally. The employer participated by Mike Connolly, President/Owner. Exhibit D-1 was received into evidence. The employer offered and Exhibit 1 was received into evidence.

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 considered all of the evidence in the record, finds that: The claimant was hired on May 1, 2018, as a full-time roofer. The employer does not have an employment handbook. It did not issue the claimant any written warnings but the owner did talk to the claimant about tardiness.

Employees habitually swore and cursed at work. They regularly acted out by punching insulation when frustrated. On March 26, 2019, the claimant was a few minutes late for work. He was on a crew with a foreman and five co-workers. After working for an hour on the "curb" of a unit's roof, the foreman told him that the work did not meet the specifications. The claimant ripped out the insulation and the membrane, which were fused together. He came down from the roof frustrated due to the wasted effort. He swore and punched some insulation. The foreman told the claimant to leave.

The claimant left the job site and called the owner. The owner did not answer the claimant's calls on March 26 or 27, 2019. He exchanged texts with the foreman. The foreman sent texts saying, "I didn't call him yesterday to get you fired. I told him that. I told him several times on the phone. I'm not calling to get Tim fired. I figured he was just mad. Just so you know, Tim, I

honestly didn't want you to get fired. And I don't think you should be fired. I guess it is what it is."

On or about March 28, 2019, the owner sent a text to the claimant saying, "I'm tired of you kicking my stuff." The owner had no further contact with the claimant. On April 3, 2019, the claimant collected his paycheck. At that time the owner told him he was terminated.

The claimant filed for unemployment insurance benefits with an effective date of January 20, 2019. He filed an additional claim for benefits on April 7, 2019, and reopened his claim on May 5, 2019. The employer participated personally at the fact finding interview on May 6, 2019, by Michael Connolly.

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, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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). The employer discharged the claimant and has the burden of proof to show misconduct. An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as the employer had not previously warned the claimant about any of the issues leading to the separation, it has not met the burden of proof to establish the claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Based on the claimant's testimony, the employer allowed other employees to behave as the claimant did on March 26, 2019. The employer treated the claimant disparately by terminating him and not the others. The employer did not provide sufficient evidence of job-related misconduct. It did not meet its burden of proof to show misconduct. Benefits are allowed provided the claimant is otherwise eligible.

The testimony of the employer and the claimant was not the same. The administrative law judge finds the testimony of the claimant to be more credible. The employer was not an eye witness to the conduct for which the claimant was terminated. The hearsay evidence provided by the employer is not more persuasive than the claimant's description of such conduct. The employer could have provided the testimony or statements of the foreman or the crew members. 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).

DECISION:

The representative's May 7, 2019, decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs