

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

GEORGE D BIGGS
Claimant

PURFOODS LLC
Employer

APPEAL 17A-UI-00538-JC
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/18/16
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 12, 2017, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. An in-person hearing was conducted at the Des Moines local office on February 8, 2017. The claimant participated personally. The employer participated through Dawn Stevens, Payroll Administrator. Employer Exhibits A and B and Claimant Exhibit 1 were admitted into evidence without objection. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a sanitation worker on third shift and was separated from employment on October 19, 2016, when he was discharged.

The employer has a policy which indicates that immediate discharge may occur for “theft, inappropriate removal or possession of property belonging to the Company, customers or other employees, including but not limited to taking prepared food off the production/fulfillment floor without authorization; or misappropriation of any type, including data from PurFoods, fellow employees, customers or partners.” (Employer Exhibit B-3). The claimant was made aware of the employer’s policies upon permanent hire in February 2016 (Employer Exhibit A). According to the employer, the claimant was discharged, along with co-worker, Jason Smith, for theft of product, which occurred during his shift on October 18, 2016.

The employer reported the claimant and his co-worker, Jason Smith, were observed by two employees, taking “meat product” from a refrigerated section of the employer premises and removing them for his personal use. The employer did not reveal who observed the claimant

taking the product, was unable to identify what products were removed, what their value was or if they were recovered, and indicated surveillance footage was not working on the day in question. The employer concluded the claimant and Mr. Smith were responsible for loss of product due to inventory not matching available product. The employer did not specify when the product was removed or when the inventory check was performed. Ms. Stevens, who participated in the hearing, was not present for the final incident or the discussion with the claimant about his discharge.

The claimant denied removing any meat product from the employer's premises on October 18, 2016 or any other day. The claimant acknowledged his co-worker, Jason Smith, was a "dumpster diver" and would rummage through the garbage before disposal but that the claimant only collected pop cans for recycling. The employer did not question the claimant about any meat product or ask about theft. The employer did question the claimant about Mr. Smith's actions. The claimant had recommended Mr. Smith for the job and contended he was discharged based on his association because Mr. Smith was struggling in the position and rude. The claimant was not informed why he was being discharged except was told by his supervisor, Mr. Crawford, that he had personally observed the claimant previously removing trash and going to his car afterwards (insinuating that he was concealing items in the trash and then taking them to his car for possession.) Mr. Crawford did not offer any specifics to the claimant at the time of the meeting, and did not attend the hearing or offer a written statement in lieu of participation. The claimant denied going to his vehicle on October 18, 2016 after removing trash. At the conclusion of the meeting, the claimant was discharged and escorted by law enforcement and management to his vehicle. Mr. Smith was discharged shortly thereafter, also for theft.

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 § 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.

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).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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 issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r. 871-24.32(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.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

In this case, the claimant was discharged for theft of an unknown quantity of "meat product", which he denied. At the hearing, the employer did not present any witnesses or statements of individuals who reportedly observed the claimant remove product from the employer premises, or who investigated the allegation or interviewed the claimant about his whereabouts. The exact product allegedly stolen could not be identified. Rather, the testimony presented was that two unnamed witnesses saw the claimant sometime during his shift remove some product and reportedly leave the premises with it, and that because the employer's surveillance footage was inoperable, the theft was confirmed by performing an inventory check at an unknown time. In contrast, the claimant denied removing any meat product from the employer, or going to his vehicle during his shift on October 18, 2016 after removing trash.

The employees with any direct knowledge of the circumstances for the claimant's discharge did not attend the hearing. No request to continue the hearing was made and no written statements of those individuals were offered. Given the serious nature of the proceeding and the employer's allegations resulting in the claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. The claimant denied removal of any meat product on October 18, 2016 and the employer did not present any evidence to refute the claimant's testimony. Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. The administrative law judge recognizes that honesty is a commonly accepted expectation of employees and theft of any product will lead to discharge. However, based on the evidence presented, the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

DECISION:

The January 12, 2017, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/rvs