IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TYRONE MITCHELL Claimant **T3 CONCRETE PUMPING, LLC** Employer	**APPEAL 20A-UI-08016-ED-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/05/20** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the June 29, 2020, (reference 05) unemployment insurance decision that denied benefits based upon claimant's discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on August 19, 2020 at 1:00 PM. The claimant, Tyrone Mitchell, participated personally. Tyler White testified for the claimant. The employer, T3 Concrete Pumping, LLC, participated through Tony Davis. No exhibits were admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a concrete belt pump operator. Claimant was employed from June 7, 2019 until January 15, 2020 when he was discharged from employment. Claimant's immediate supervisor was Tony Davis.

On June 10, 2019, claimant signed receipt of the employee handbook. The handbook addresses employee behavior stating that employees are expected to work in a respectful, professional manner at all times. Hitting, shoving and threats are cause for automatic termination.

On January 15, 2020, claimant was working on a concrete site in Grimes, Iowa. Tony Davis drove up to the work site in his pick up. When Mr. Davis arrived, he instructed claimant to use a different piece of machinery than what he was using. Claimant completed the task and then approached Mr. Davis, who was seated in his truck. The two engaged in a verbal argument. Claimant threatened to pull Mr. Davis from his truck. Mr. Davis told claimant he was fired. Claimant continued to threaten to pull Mr. Davis from his truck. Mr. Davis put another operator

on the equipment that claimant had been using and left the work site. An Uber was called to remove claimant from the work location. Claimant never returned to work.

Claimant was previously reprimanded by his employer on 7/26/19, 9/5/19, 9/30/19, 12/2/19, and 12/19/19.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for job-related misconduct. Benefits are denied.

As a preliminary matter, I find that the Claimant did not quit. Claimant was discharged from employment.

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).

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.

Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. 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. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Further, poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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*. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the Administrative Law Judge finds that the employer's testimony is more credible than the Claimant's.

While the written employee witness statement that was read into the record by the employer was a hearsay statement, administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and

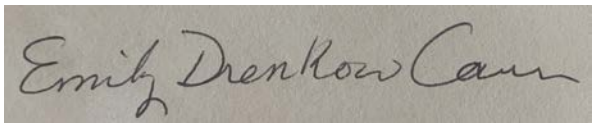
may constitute substantial evidence. Gaskey v. Iowa Dep't of Transp., 537 N.W.2d 695, 698 (Iowa 1995). In considering whether specific hearsay testimony is "the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs" there are five factors to be considered. *Schmitz v. Iowa Dep't of Human Servs*., 461 N.W.2d 603, 607-08 (Iowa Ct.App. 1990)(citing Iowa Code § 17A.14(1)). Those factors include: (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. Id. at 608. The employee statement as well as Mr. Davis' testimony and claimant's own admission are all consistent in that claimant was yelling at Mr. Davis and threatened to pull Mr. Davis from his truck. As such, I find the consistent statements that claimant was engaged in a verbal altercation and that claimant tried to engage in a physical altercation persuasive.

The claimant participated in the altercation and did not attempt to retreat or seek supervisor assistance. The employer has a right to expect civility among its employees. An employer does not have to tolerate violence in the workplace because it diminishes the overall expectation of safety, well-being and respect among employees in the work environment.

Employers do have an interest in protecting the safety of all of its employees and invitees. Where a claimant participated in a confrontation without attempt to retreat, the Iowa Court of Appeals rejected a self-defense argument stating that to establish such a defense the claimant must show freedom from fault in bringing on the encounter, a necessity to fight back, and an attempt to retreat unless there is no means of escape or that peril would increase by doing so. *Savage v. Emp't Appeal Bd.*, 529 N.W.2d 640 (Iowa Ct. App. 1995). In this matter the claimant was the party that instigated the encounter; claimant did not have a necessity to fight back and could have retreated instead of engaging in the physical altercation. Claimant chose not to and continued to engage in fighting at work. Claimant's actions regarding fighting and violence in the workplace constitute an intentional and substantial disregard of the employer's interest and is indicative of a deliberate disregard of the employer's interests. As such, benefits are denied.

DECISION:

The June 29, 2020, (reference 05) unemployment insurance decision is affirmed. Claimant was discharged from employment for job-related misconduct. Benefits are withheld in regards to this employer until such time as claimant is deemed eligible.



Emily Drenkow Carr
Administrative Law Judge

August 28, 2020
Decision Dated and Mailed

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