

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARC D JENKINS**

Claimant

**APPEAL NO. 15A-UI-12183-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MARKETLINK INC**

Employer

**OC: 11/30/14**

**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the October 29, 2015, reference 04, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged for no disqualifying reason. After due notice was issued, a hearing was held on November 19, 2015. Claimant Marc Jenkins participated. Kelly Hauschildt represented the employer and presented additional testimony through Mike Vogle and Travis Hoffpauers. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which record indicates that no benefits have been disbursed to the claimant since his separation from the employer. Exhibits One and Two were received into evidence.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Marc Jenkins was employed by MarketLink, Inc. as a full-time telephone customer service representative from June 2015 until August 20, 2015, when Shaylene Houston, Human Resources Supervisor, discharged him for allegedly harassing another employee, Virginia Miller. Mr. Jenkins and Ms. Miller worked in close proximity and routinely engaged in mutual banter. Ms. Miller had disclosed to Mr. Jenkins that she was a recovering drug addict. During the pair's casual conversation on August 19, Ms. Miller asked him to look at some sores on her skin and asserted that she had scratched herself while she was sleeping. Ms. Miller also showed Mr. Jenkins her fingernails. Mr. Jenkins noticed that Ms. Miller had minimal fingernails. Mr. Jenkins was aware that of a drug dealing residence located close to the workplace and told Ms. Miller that her sores looked like something that the residents up the street might have. Ms. Miller told Mr. Jenkins to "shut the fuck up." Mr. Jenkins told Ms. Miller that he was grown and that Ms. Miller did not need to speak to him like that. Ms. Miller then told Mr. Jenkins that

she could call someone to make him “shut the fuck up for good.” Ms. Miller then made contact with a supervisor to complain about Mr. Jenkins implication that her sores derived from illicit drug use. Mr. Jenkins observed Ms. Miller make contact with the supervisor.

On the morning of August 20, the employer pulled Mr. Jenkins aside and issued a reprimand concerning his August 19 comments to Ms. Miller. During the meeting, Mr. Jenkins referenced the threats that Ms. Miller had directed at him. After the meeting, Mr. Jenkins returned to his work duties. Later during the August 20 shift, Ms. Miller alleged to a supervisor that Mr. Jenkins had addressed her upon his return to the work area and had asked her whether she was “the snitch who had ratted” on him. Mr. Jenkins had not engaged Ms. Miller in the alleged conversation and had not uttered the words attributed to him. The employer nonetheless summoned Mr. Jenkins to a meeting and discharged for engaging in further harassment and retaliatory behavior in violation of the employer’s harassment policy.

### **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.

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 this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits.

Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a “current act,” the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. 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 evidence in the record fails to establish misconduct in connection with the employment. The employer failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to rebut Mr. Jenkins’ testimony that no such conversation occurred between Mr. Jenkins and Ms. Miller upon his return to the work area after the disciplinary meeting. The employer had the ability to present testimony from persons with firsthand knowledge of the alleged conduct, but elected not to present such testimony. The evidence establishes that Mr. Jenkins’ comments on August 19 arose from a good faith error in judgment, rather than an intention to harass Ms. Miller, and occurred in the context of casual banter. Mr. Jenkins’ comments on August 19 did not rise to the level of misconduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Jenkins was discharged for no disqualifying reason. Accordingly, Mr. Jenkins is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged for benefits.

**DECISION:**

The October 29, 2015, reference 04, decision is affirmed. The claimant was discharged on August 20, 2015 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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