

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

TYRAN C COLLINS
Claimant

APPEAL NO. 19A-UI-05849-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SEARS MANUFACTURING CO
Employer

OC: 12/23/18
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Admin. Code Rule 871-24.23(8) – Current Act Requirement

STATEMENT OF THE CASE:

Tyran Collins filed a timely appeal from the July 19, 2019, reference 04, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that Mr. Collins was discharged on July 3, 2019 for violation of a known company rule. After due notice was issued, a hearing was held on August 14, 2019. Mr. Collins participated. Robin Moore of Employers Edge represented the employer and presented testimony through Trisha Taylor. Exhibit A was 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 evidence establishes a "current act" of misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tyran Collins was employed by Sears Manufacturing Company as a full-time assembler from September 2018 until July 3, 2019, when Trisha Taylor, Human Resources Director, discharged him from the employment. Ms. Taylor's decision to discharge Mr. Collins from the employment was based on her conclusion that Mr. Collins had retaliated against a female coworker following an allegation of sexual harassment.

In May 2019, the female coworker had reported to the employer that Mr. Collins had uttered to her unwelcomed comments of a sexual nature. The employer investigated the allegation. The employer concluded that the employer had insufficient proof that Mr. Collins had uttered the particular statements the complainant alleged he had uttered. However, in the course of conducting the investigation, other employees made similar allegations concerning Mr. Collins' utterances in workplace. In May 2019, the employer issued a written reprimand to Mr. Collins, suspended him from the employment for five days, and directed him not to retaliate against the complainant or against the purported witnesses to the harassment the complainant alleged had occurred. The employer also provided Mr. Collins with a copy of the harassment policy the employer had provided to him at the time of hire.

On July 2, 2019, Mr. Collins was in the presence of two coworkers, male and female, and observed those coworkers shared a “fist bump.” In an attempt to be social and add to the levity of the moment, Mr. Collins uttered the two-word statement “sexual harassment” in a playful tone. The complainant in the May 2019 matter was not present for the July 2, 2019 utterance. However, the male coworker who had engaged in the fist-bump elected to go tell that female coworker about Mr. Collins’ utterance. The complainant in the May 2019 matter then reported to Ms. Taylor that Mr. Collins had retaliated against her. On July 3, 2019, Ms. Taylor questioned Mr. Collins regarding the utterance. Mr. Collins initially denied that he had uttered the comment, but then conceded he had uttered the comment in a joking manner. Ms. Taylor discharged Mr. Collins from the employment at that time under the theory that Mr. Collins’ two-word utterance on July 2 constituted retaliation against the complainant in the May 2019 matter.

REASONING AND CONCLUSIONS OF LAW:

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 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).

The evidence in the record fails to establish a current act of misconduct in connection with the employment. The employer had sufficient reason in May 2019 to conclude that Mr. Collins had engaged in sexually harassing behavior in the workplace leading up to the May 2019 complaint. With that said and without discounting the concerns that came to the employer's attention in May 2019, Mr. Collins' ill-advised but harmless July 2, 2019 utterance did not constitute retaliation against the May 2019 complainant or anyone else. The May 2019 complainant was not present for the utterance. The utterance was not directed at or about the May 2019 complainant. Nor did the utterance create a hostile work environment. It is simply too much of a stretch to conclude that the July 2 utterance violated any employer policy or that it constituted misconduct in connection with the employment. Given the context of the July 3 meeting with the employer, Mr. Collins' brief hesitancy in conceding that he had made the July 2 utterance did not rise to the level of disqualifying misconduct. In the absence of proof of a current act of misconduct, the evidence establishes a discharge for no disqualifying reason. Mr. Collins is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The July 19, 2019, reference 04, decision is reversed. The claimant was discharged on July 3, 2019 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs