

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ERICA K HENRY
Claimant

APPEAL NO. 12A-UI-03190-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 02/05/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Employer filed a timely appeal from a representative's decision dated March 21, 2012, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was held on April 12, 2012. Claimant participated. The employer participated by Ms. Deb Berhens, Store Manager.

ISSUE:

The issue in this matter is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Erica Henry was employed by Casey's Marketing Company from June 22, 2010 until December 12, 2011 when she was discharged from employment. Ms. Henry worked as a part-time cashier and was paid by the hour. Her immediate supervisor was Deb Berhens.

The claimant was discharged on December 12, 2011 based upon the employer's belief that the claimant had violated its break policy by making Facebook entries at 5:57 p.m. and 6:57 p.m. on December 4, 2011. The employer also felt that Facebook entries made by the claimant at 7:27 and 8:20 that night were violations because they did not occur at least two hours apart. Company policy requires employees to refrain from taking breaks between 10:00 a.m. and 1:00 p.m. and 4:00 p.m. and 7:00 p.m. Employees are not allowed to take short breaks unless the break periods are at least two hours apart. The employer alleges that at least one of the Facebook entries was a statement by the claimant that she might walk off the job.

Prior to discharge the claimant had not been specifically warned about taking unauthorized breaks but had been warned about cell phone usage. The claimant had been warned that a further violation of the cell phone policy would result in an additional warning and that then the claimant would be subject to discharge. At the time of termination the claimant had only received one warning prior to her discharge on December 12, 2011.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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.

871 IAC 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.

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 insurance benefits. Misconduct that may be serious enough to warrant a discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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 a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

Allegations of misconduct without additional evidence shall not be sufficient to result in a disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

In this matter the evidence establishes that the claimant had been previously warned on one occasion about cell phone use at work. The claimant had been warned at that time that she would receive a second warning before she was being subject to discharge.

The claimant was discharged on December 12, 2011 for an incident that had taken place on December 4, 2011. The employer alleged that two Facebook entries were made by the claimant during a non-break period and that two other entries were made later without at least two hours elapsing. The employer thus concluded that the claimant had violated the company's break policies.

The claimant had not been previously warned about a violation of break policies and the evidence in the record does not establish that the entries made by the claimant were of such a length or of such a nature so as to establish that the claimant had taken significant amounts of time away from work for non-work-related reasons.

The administrative law judge finds the claimant's position that her Facebook entries were "private" and would not be viewed by others to strain credibility. The claimant knew or should have known that when she placed Facebook entries in the social media domain that the chances were very likely that other individuals who were authorized access would disseminate and pass on Ms. Henry's entries to others without regard for whether the claimant desired them to do so or not.

The administrative law judge concludes, however, that the evidence in the record is not sufficient to warrant the denial of unemployment insurance benefits. The administrative law judge concludes that the previous warnings served on the claimant were insufficient and that the claimant believed that she would be warned again if the employer felt her conduct was not satisfactory. While the decision to terminate the claimant may have been a sound decision from a management viewpoint for the above-stated reasons the administrative law judge concludes that the employer has not sustained its burden of proof in establishing misconduct sufficient to warrant the denial of unemployment insurance benefits.

DECISION:

The representative's decision dated March 21, 2012, reference 01, is affirmed. The claimant was discharged under nondisqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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