

date. A phone call Mr. Lo made on the employer's phone system was randomly selected for recording. At the time the call was recorded, Mr. Lo's supervisor monitored the call. Mr. Lo telephoned a friend/coworker who also participated from the employer's phone system. During the call, Mr. Lo used profanity and offered to send the coworker a picture of a female coworker in a bathing suit. The profanity used was "hell" and "shit." The female coworker was a friend to Mr. Lo and had provided the photograph to Mr. Lo. Mr. Lo was on his morning break at the time of the call.

The employer deemed the content of the phone call to be in violation of the employer's policy regarding appropriate workplace behavior. The policy is set forth in the employer handbook, a copy of which Mr. Lo received on April 1, 2003. The policy prohibits use of profanity and harassment and is a "zero tolerance" policy. Mr. Lo had received no prior reprimands for similar behavior.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Lo was discharged for substantial misconduct in connection with his employment. 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since the claimant was discharged, 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 a current act of misconduct, a discharge of 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).

The evidence in the record indicates that Mr. Lo made a casual telephone call to a friend/coworker while he was on break, used mild profanity during the call and referred to a picture of a female coworker, who had provided the picture to Mr. Lo. While Mr. Lo's behavior on the employer's phone system displayed poor judgment, it did not amount to substantial misconduct that would disqualify him for unemployment insurance benefits. Accordingly, Mr. Lo is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Lo.

DECISION:

The Agency representative's decision dated September 12, 2005, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

jt/pjs