IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

MELISSA A DAUPHIN
PO BOX 247
ALBANY IL 61230-0247

DM SERVICES INC
1515 S 21ST ST
CLINTON IA 52732-6676

Appeal Number: 06A-UI-07546-JTT
OC: 07/02/06 R: 04
Claimant: Appellant (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Melissa Dauphin filed a timely appeal from the July 24, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 14, 2006. Ms. Dauphin participated and presented additional testimony through former Clerical Department Lead Tonya Schaver. Operations Manager Dawn White represented the employer. Employer's Exhibits One through 25 were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Melissa Dauphin was employed by DM Services as a full-time, second-shift Credit Supervisor from October 10, 2005 until June 29, 2006, when Operations Manager Dawn White and Human Resources Manager Jane Monahan discharged her for alleged sexual harassment of a male

subordinate. Ms. Dauphin's immediate supervisor was Assistant Operations Manager Sherri Law. Assistant Credit Supervisor Marty Heldt, the male employee in question, reported to Ms. Dauphin. The employer is a credit collections business.

The final incident that prompted the discharge came to the employer's attention on May 31, when Mr. Heldt complained to Assistant Operations Manager Sherri Law that Ms. Dauphin was harassing him. As a supervisor, Ms. Dauphin was responsible for enforcing the employer's formal policy against sexual harassment in the workplace and was well aware of the policy. Between May 31 and June 5, Ms. Law investigated the complaint by speaking with Mr. Heldt, and employees Bonnie McManus and Brenda Johnson. On June 5 or 6, Ms. Law reported the matter to Operations Manager Dawn White. On June 7 or 8, Ms. White contacted Human Resources Manager Jane Monahan for advice on how best to investigate and respond to Mr. Heldt's complaint.

On June 13, Ms. White and Ms. Law met with Ms. Dauphin to discuss the complaint. At that time, Ms. Dauphin asked whether her job was in jeopardy and the employer indicated it would depend on the outcome of the employer's investigation.

On June 14, Mr. Heldt alleged that Ms. Dauphin had retaliated against him for his complaint by issuing a reprimand to him for conduct he directed towards a lower ranking supervisor or "lead" and by conducting one-on-one conferences with other supervisors or "leads" to gain information about his complaint. Ms. Law and/or Ms. White further consulted with Ms. Monahan and proceeded with investigation of alleged misconduct.

On June 19, Mr. Heldt filed a written complaint, in which he alleged that Ms. Dauphin had on several occasions engaged in inappropriate conduct of a sexually harassing nature. Mr. Heldt alleged that Ms. Dauphin had stuffed a sweater under her top and stated she was pregnant with his baby. Mr. Heldt alleged that Ms. Dauphin had announced at a fall 2005 meeting that Mr. Heldt was to be the "cleavage monitor" for purposes of enforcing the employer's dress code. Mr. Heldt alleged Ms. Dauphin had been part of an incident wherein several female supervisors wore low cut blouses and applied glitter to their bosoms. Mr. Heldt alleged that Ms. Dauphin had made inappropriate remarks to Mr. Heldt's spouse during a telephone conversation. Mr. Heldt alleged that Ms. Dauphin had reprimanded him in retaliation for his prior, verbal complaint. Mr. Heldt alleged that Ms. Dauphin performed personal work, that is paid her bills, on company time. The employer did not provide Ms. Dauphin with a copy of the written complaint or submit a copy of the complaint for the hearing. Mr. Heldt did not testify at the hearing.

On June 20, Ms. White and/or Ms. Law interviewed the employees regarding Mr. Heldt's allegation that Ms. Dauphin had stuffed a sweater under her top and indicated that she was pregnant with his baby. Mr. Heldt had not actually been present for the alleged sweater incident. One employee indicated she had witnessed such an incident. The same employee provided a written statement in which she alleged that Ms. Dauphin had initiated and/or participated in a workplace conversation concerning oral sex.

On June 20, Ms. White and/or Ms. Law also interviewed Ms. Dauphin regarding the allegations Mr. Heldt had set forth in his written complaint. Ms. Dauphin denied any knowledge about the glitter incident or that she had announced that Mr. Heldt was to be the "cleavage monitor." Ms. Dauphin indicated that Mr. Heldt had been part of the telephone call to his spouse, had prompted Ms. Dauphin's involvement in the call, and that she had said nothing inappropriate during the call. Mr. Dauphin indicated that she had indeed reprimanded Mr. Heldt for

inappropriately interrupting a meeting between Ms. Dauphin and "lead" Tonya Schaver and for directing unwarranted criticism toward Ms. Schaver. Ms. Dauphin indicated that the sweater incident had not occurred as alleged by Mr. Heldt and/or Ms. Roberts. Ms. Dauphin indicated that the sweater incident had concerned another instance in which two female employees had told Ms. Dauphin as part of a prank they were pregnant and would be on leave during the employer's busiest season. Ms. Dauphin indicated that she did place a sweater under her top and go in search of the two female employees who had played the prank on her. Ms. Dauphin indicated the comment about being pregnant with Mr. Heldt's baby had occurred on another occasion and had not occurred as alleged by Mr. Heldt. Ms. Dauphin indicated that Mr. Heldt had presented her with a necklace as a gift, that other employees had inquired about the basis for such a gift and alleged a personal relationship between Ms. Dauphin and Mr. Heldt. Ms. Dauphin told the employer she had responded to the employee's comment by saying, "It's not because I'm pregnant with his baby." After the meeting on June 20, Human Resources Manager Jane Monahan suspended Ms. Dauphin with pay.

On June 22, the employer requested, in writing, that Ms. Dauphin provide a written response to Mr. Heldt's allegations. The employer further requested that Ms. Dauphin provide "a written, detailed action plan as to what [she] would do to correct the current inappropriate behaviors" and address "how [she] planned to improve [her] behaviors while interacting with other employees."

On June 23, Ms. White and/or Ms. Law interviewed additional employees regarding the allegations set forth in Mr. Heldt's complaint. A male employee told the employer he had witnessed the sweater incident and that Ms. Dauphin had in fact come looking for Mr. Heldt and that she had uttered, "But Marty, it's your baby," before she realized Mr. Heldt was not in the area. Another employee said she sensed interpersonal conflict between Ms. Dauphin and Mr. Heldt. Yet another employee indicated she had been present at the time Mr. Heldt interrupted the meeting between Ms. Dauphin and Ms. Schaver.

The employer collected written statements from several employees and made most, if not all, of the statements available for the hearing. Multiple statements indicate that Ms. Dauphin did in fact put a sweater under her top and announce that she was pregnant with Mr. Heldt's baby. Multiple statements indicate that Ms. Dauphin did announce at a meeting that Mr. Heldt would be the designated "cleavage monitor." Multiple statements indicate Ms. Dauphin did in fact have knowledge of and participate in the glittered bosoms and low cut blouse incident. Multiple statements indicate that Mr. Heldt did not willingly participate in the incidents that prompted his complaint.

On June 26, the employer received Ms. Dauphin's written response to the employer's June 22 request. The employer concluded that Ms. Dauphin had not adequately acknowledged her responsibility for maintaining a workplace free of hostility or how she had contributed to creating a hostile environment.

On June 29, the employer told Ms. Dauphin that she was discharged from the employment.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Dauphin was discharged for misconduct in connection with the 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).

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).

When the record in support of a party is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. Schmitz v. IDHS, 461 N.W.2d 603, 607 (Iowa App. 1990). Both the quality and quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See Iowa Code section 17A.14(1). In making the evaluation, the fact finder should conduct a common sense evaluations of (1) the nature of the hearsay, (2) the availability of better evidence, (3) the cost of acquiring better evidence, (4) the need for precision, and (5), the administrative policy to be fulfilled. Schmitz, 461 N.W.2nd at 608. "[T]he proper weight to be given to the hearsay evidence in such a hearing will depend upon a myriad of factors—the circumstances of the case, the credibility of the witness, the credibility of the declarant, the circumstances in which the statement was made, the consistency of the statement with other corroborating evidence, and other factors as well." Walthart v. Board of Directors of Edgewood-Colesburg Community School, 694 N.W.2d 740, 744-45 (Iowa 2005).

Though the employer failed to provide testimony from Mr. Heldt or other employees interviewed as part of the investigation, the consistency of the written statements lends credibility to the assertions made therein. In addition, the exhibits presented by the employer demonstrate an organized attempt on the part of the employer to thoroughly investigate and to fairly and accurately record responses provided by employees, thereby lending further credibility to assertions set forth in the exhibits. On the other hand, the evidence indicates that Ms. Dauphin has made inconsistent statements over time, first indicating to the employer that Mr. Heldt had been present and participating in the sweater incident and later indicating he had not been present and that the incident had nothing to do with him. This shifting of stories undermines Ms. Dauphin's credibility.

Though the conduct at issue began to come to the employer's attention on May 31, the evidence indicates that the employer was actively engaged in investigating the matter until June 23 and that there was no unreasonable delay in the investigation. The evidence also indicates that the employer had notified Ms. Dauphin on June 13 that the complained of behavior could result in discipline up and including discharge from the employment.

The greater weight of the evidence indicates that Ms. Dauphin did in fact direct sexually harassing behavior towards Mr. Heldt and did so on a fairly consistent basis until Mr. Heldt was no longer willing to tolerate the behavior. The evidence indicates that Ms. Dauphin was fully aware of the impact of her behavior on Mr. Heldt. Not only did Ms. Dauphin engage in sexually harassing behavior, the evidence indicates that Ms. Dauphin encouraged others to do the same.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Dauphin was discharged for misconduct. Accordingly, Ms. Dauphin is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Dauphin.

DECISION:

The Agency representative's July 24, 2006, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

jt/pjs