

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAWN M SUMAN
Claimant

APPEAL NO. 07A-UI-03955-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALLSTEEL INC
Employer

OC: 03/25/07 R: 04
Claimant: Appellant (2-R)

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

STATEMENT OF THE CASE:

Dawn Suman filed a timely appeal from the April 11, 2007, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on May 2, 2007. Ms. Suman participated and presented additional testimony through her father, Thomas Suman. Jennifer Collins, Member Community and Relations Generalist, represented the employer.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Dawn Suman was employed by Allsteel as a full-time, second-shift Machine Operator from September 1, 2003 until March 27, 2007, when Member and Community Relations Manager Mike Allbee discharged her. Ms. Suman's hours on the second shift had been 3:00 p.m. to 11:00 p.m. Ms. Suman's immediate supervisor had been Corey Freeman. On July 23, 2006, Ms. Suman commenced an approved leave of absence due to a non-work-related knee injury. During the leave, Ms. Suman provided the employer with appropriate medical updates and the employer continued to extend her leave.

The employer discharge Ms. Suman on March 27 based on events that transpired in the employer's parking lot on March 20. On that night, Ms. Suman had gone to the plant to speak with an employee. At approximately 11:00 p.m., Ms. Suman was waiting in her car in the employer's parking area. Allsteel Work Cell Operator Jesse Gatewood joined Ms. Suman in her car. The two engaged in a conversation during which Mr. Gatewood repeatedly referred to Ms. Suman as "woman." Ms. Suman asked Mr. Gatewood not to call her that. After Mr. Gatewood persisted in referring to Ms. Suman as "woman," Ms. Suman either tapped him or slapped him on the back of the head. Mr. Gatewood subsequently reported the incident to Work Cell Operator Rob Howard, who reported it to Mr. Allbee. All three men continue to work for the employer, but none testified.

The employer has a written policy that prohibits workplace harassment. Ms. Suman had signed her acknowledgement of the policy on March 8, 2006. In addition, the employer had a policy that prohibited employees from being on the employer's property during their off-duty hours.

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.

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 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, by a preponderance of the evidence, misconduct that would disqualify Ms. Suman for unemployment insurance benefits. The evidence fails to establish that Ms. Suman's act of slapping or tapping Mr. Gatewood was an act of violence or harassment, rather than mild horseplay between friends. The administrative law judge notes that neither Ms. Suman nor Mr. Gatewood was on duty at the time of the incident. The employer has failed to present any testimony from Mr. Gatewood, the alleged victim and only witness to the alleged assault. The employer has likewise failed to present testimony from Rob Howard, who came in contact with Ms. Suman on the night in question, or Mike Allbee, to whom Mr. Howard and Mr. Gatewood reported the incident. Ms. Suman's act of going to the workplace during off-duty hours would not constitute misconduct that would disqualify her for benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Suman was discharged for no disqualifying reason. Accordingly, Ms. Suman is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Suman.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical

ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

The evidence in the record raises the question of whether Ms. Suman has been able to work since she established her claim for benefits. That issue was not before the administrative law judge and no medical evidence was presented. This matter will be remanded to a claims representative so that Ms. Suman's ability to work and availability for work may be resolved. Ms. Suman should be required to provide appropriate medical documentation of her ability to work.

DECISION:

The claims representative's April 11, 2007, reference 02, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged. The matter is remanded to a claims representative so that the Agency may determine whether the claimant has been able to work and available for work since establishing her claim for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw