IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JENNIFER L CARLEY
Claimant

STREAM INTERNATIONAL INC
Employer

APPEAL NO. 11A-UI-06299-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/17/11
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Jennifer Carley filed a timely appeal from the May 5, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 21, 2011. Ms. Carley participated. Hanna Cook represented the employer and presented testimony through Jennifer Nelson.

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: Jennifer Carley was employed by Stream international as a full-time customer service professional from 2008 until April 12, 2011, when Jennifer Nelson, team manager, discharged her for inappropriate conduct involving use of profanity at the workplace. The employer had a written policy that expressly prohibited profanity in the workplace. Employer operated a call floor in which many employees worked in close proximity and in which many employees might be on the telephone with a customer at any given time. Ms. Carley was aware of the policy.

The final incident that triggered the discharge occurred on April 11, 2011. On that day, Ms. Carley was corresponding by e-mail with a senior representative in Oregon about some questions a customer had about some Nike product. Ms. Carley thought she received an unhelpful and unprofessional response from the representative. This set Ms. Carley off and she sent a responsive e-mail to the representative that included the statement she was a chick and did not know football from “a freakin’ hole in the ground.” While this language in the e-mail was not appropriate, it was not the worst thing that happened in connection with the incident. As Ms. Carley was sending e-mail, she was speaking to coworkers about the correspondence. Ms. Carley was within earshot of other employees who were not directly involved in the conversation but who were working in her same bay. Ms. Carley was within earshot of coworkers in the next bay, some of whom may have been on the telephone with customers. Ms. Carley announced that she would probably be "fucking fired” for sending her e-mail, but that

she did not care. A couple of Ms. Carley's coworkers reported the incident to Team Manager Jennifer Nelson.

This final incident followed another profane outburst on March 2, 2011. On that day, Ms. Nelson walked into Ms. Carley's work area in time to hear Ms. Carley say, "I'm fucking sick of dealing with fucking idiots today. I can't deal with this fucking anymore." Ms. Nelson counseled Ms. Carley concerning the use of profanity, told her it was unacceptable, especially in the vicinity of other employees, and told her that continued use of profanity could cost her her job. Ms. Carley said she did not care.

These two incidents in 2011 followed another profane outburst in February 2010.

During Ms. Carley's employment, she was also dealing with serious family matters concerning her father's mental health and substance abuse. While the employer was empathetic and supportive, the employer made clear to Ms. Carley that the use of profanity had to stop. Ms. Carley had told the employer that she would try, but could not guarantee anything.

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).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. Deever v. Hawkeye Window Cleaning, Inc. 447 N.W.2d 418 (Iowa Ct. App. 1989).

The weight of the evidence in the record establishes misconduct in connection with the employment. Ms. Carley knew all along that the employer had a policy that expressly prohibited profanity in the workplace. The rule was especially important in this workplace, given the nature of the work performed there and the number of employees working in close proximity. Ms. Carley intentionally violated the prohibition against profanity on two occasions about six weeks apart. Had the inappropriate conduct been limited just to what occurred on April 11, perhaps it could have been attributed to poor judgment and stress. But, we are not talking about an isolated incident. Instead, the evidence indicates an even worse profane outburst at the beginning of March. That one involved the same sort of former remark, but was in reference to the people with whom Ms. Carley was interacting at the time, presumably customers. Both instances involved highly inappropriate language uttered on the call floor in the presence of other employees. Both instances involved an element of defiance, in essence challenging the employer to take action. Whatever stress Ms. Carley was experiencing outside the workplace in no way excused her decision, or repeated decision, to utter offensive and profane remarks in the workplace.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Carley was discharged for misconduct. Accordingly, Ms. Carley 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. Carley.

DECISION:

The Agency representative's May 5, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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