

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAY L STEWART
Claimant

APPEAL NO. 12A-UI-0-3416-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 02/19/12
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 27, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 18, 2012. Claimant Jay Stewart participated. David Williams of Talx represented the employer and presented testimony through Linda Lee, Angie Caves, Jessie Thompson, and Deb Braden. Exhibits One through Seven were received into evidence.

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: Jay Stewart was employed by Care Initiatives, d/b/a Northern Mahaska Nursing & Rehab, as a full-time maintenance worker from 2009 until February 17, 2012, when Linda Lee, Administrator, discharged him from the employment. Ms. Lee had been the facility administrator for 17 years. Ms. Lee had become Mr. Stewart's immediate supervisor in November 2011 due to interpersonal conflict between Mr. Stewart and Angie Caves, Environmental Supervisor.

Ms. Caves had joined the employer in July 2011. The Environmental Supervisor had historically been the supervisor over the maintenance staff, in addition to supervising the housekeeping and laundry staff. Ms. Caves and Mr. Stewart did not know one another prior to Ms. Caves going to work for the employer. Mr. Stewart's wife was familiar with Ms. Caves and had made highly disparaging comments about Ms. Caves to Mr. Stewart. In other words, the relationship was poisoned on Mr. Stewart's end before he and Ms. Caves ever worked together.

During his employment, Mr. Stewart engaged in conduct that indicated a lack of respect for female staff at Northern Mahaska Nursing & Rehab. In April 2011, Administrator Lee issued a written reprimand to Mr. Stewart after he told housekeeper Jessie Thompson that they should have a wet t-shirt contest. The incident occurred when Ms. Thompson took out some trash and encountered Mr. Stewart, who was using a water hose. Ms. Thompson reported the incident to

Ms. Lee. Ms. Lee warned Mr. Stewart that she deemed the conduct harassment under the employer's harassment policy and that it would not be tolerated. Mr. Stewart directed other inappropriate sexual innuendo toward Ms. Thompson that prompted her to return to Administrator Lee in June. Ms. Lee issued a second written reprimand for harassment and suspended Mr. Stewart for three days.

At the beginning of November 2011, Ms. Lee issued a written reprimand to Mr. Stewart after he announced in the presence of a resident and within earshot of staff that Ms. Caves "should mind her own damn business." Ms. Caves was Mr. Stewart's supervisor at that point. Mr. Stewart's utterance followed a disagreement over Mr. Stewart ordering supplies without running it by Ms. Caves. It was shortly after that incident that Ms. Lee took over as Mr. Stewart's immediate supervisor. Mr. Stewart admitted to making the comment about Ms. Caves needing to mind her own business, but denied using profanity. A social worker on staff had reported the matter to Ms. Lee, including the use of profanity.

On January 5, 2012, Ms. Caves went to turn off the light in a storage closet used by Mr. Stewart and got her fingernails covered in grease. Mr. Stewart had placed grease on the light switch. On the next day, Ms. Caves discovered the grease and soot on knob of the radio, where Mr. Stewart had left it for her. When Ms. Lee confronted Mr. Stewart about the greased light switch and radio control knob, Mr. Stewart made up a story about an uncontrollable grease gun. Ms. Lee concluded the explanation was plausible and did not issue a reprimand.

The final incidents that triggered the discharge were back-to-back incidents on February 16 and 17, wherein Mr. Stewart intentionally left a dirty, dusty mess on Ms. Caves' desk. Mr. Stewart and Ms. Caves shared an office in which each had a desk. On the wall next to the door were some large dust mops. Ms. Caves did not report the incident on February 16. On that same day, Mr. Stewart pulled housekeeper Deb Braden aside to point out work he thought Ms. Caves' had left undone in a room. During the conversation with Ms. Braden, Mr. Stewart referred to Ms. Caves as a stupid bitch. Mr. Stewart had previously made a similar remark about Ms. Caves within earshot of housekeeper Jessie Thompson.

On February 17, Ms. Caves returned from her lunch break to find dirt, hair, dust mop dust, and mop string in a mess on her desk, where Mr. Stewart had left the mess for her to find. Ms. Caves went to Ms. Lee in tears and said she could not take it anymore. When Administrator Lee confronted Mr. Stewart about the incident, Mr. Stewart began to offer an explanation. Ms. Lee cut him off and discharged him from the employment. Mr. Stewart concedes that he left a mess on Ms. Caves' desk, but argues it was an accident and that he did not have the necessary 30 seconds available to clean the mess.

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).

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 administrative law judge found significant aspects of Mr. Stewart's testimony to be lacking in credibility. When questioned about the prior written reprimands for sexually harassing behavior directed at Ms. Thompson, Mr. Stewart displayed rather convenient lapses in memory. Mr. Stewart's testimony concerning the greased light switch, the greased radio knob, and the mess left on Ms. Caves' desk on February 17 all share the same air of convenience and lack of credibility. What is clear is that Mr. Stewart resented Ms. Caves' presence and authority from the time she started her position and that his contempt for Ms. Caves continued unabated to the very end of his employment, as indicated by his reference to her being a stupid bitch just one day before he was discharged from the employment. The weight of the evidence indicates that Mr. Stewart did indeed engage in a pattern of harassment directed at female coworkers. The pattern included the prior sexually harassing comments directed at Ms. Thompson, reference to Ms. Caves being a bitch on multiple occasions, announcing that Ms. Caves needed to mind her own business, greasing the light switch and radio knob in the storage room, and intentionally leaving a mess on Ms. Caves' desk the last two days of his employment. In this case, the

simpler explanation of events is substantially more plausible than the more complicated and convenient explanation provided by Mr. Stewart.

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

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's March 27, 2012, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs