

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTEN STRETCH
Claimant

APPEAL NO. 10A-UI-16476-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**SEDGWICK CLAIMS
MANAGEMENT SERVICES INC
SEDGWICK CMS**
Employer

**OC: 09/26/10
Claimant: Respondent (2-R)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 19, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 20, 2011. The claimant did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Roxanne Rose of TALX represented the employer and presented testimony through Julia Holdridge and Jane Puccio. Exhibits One, Two, and Three 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: Kristen Stretch was employed as a full-time telephone customer service representative from December 2009 until March 25, 2010, when the employer discharged her for violating the employer's code of conduct and electronic information security policy. On March 22, 2010, a coworker brought to the employer's attention some correspondence on a Facebook "wall" to which Ms. Stretch had contributed. Another employee had referenced in the correspondence thread that she hated one of the employer's clients, had named the client, and had made offensive and vulgar remarks about the client's staff. Ms. Stretch followed up the coworker's statement by specifically referencing another of the employer's clients by name, by asserting that the client's employees were illiterate, and then tacked on the word "fuck" at the end of the correspondence. Ms. Stretch had contributed this material to the Facebook "wall" thread at a time when she was supposed to be performing her work duties.

Ms. Stretch's actions were in violation of the employer's code of conduct and the employer's electronic information security policy, both of which were contained in the handbook provided to Ms. Stretch at the start of her employment. The electronic information security policy required

that Ms. Stretch hold as confidential information relating to the employer and the employer's clients.

Jane Puccio, Service Center Team Lead, was Ms. Stretch's immediate supervisor. When Ms. Puccio discussed the matter with Ms. Stretch, Ms. Stretch initially asserted that her contribution to the Facebook thread had been made at a time when she was on break. This was not true. After Ms. Puccio demonstrated this was not true, Ms. Stretch conceded the fact and apologized for the conduct.

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 weight of the evidence in the record establishes that Ms. Stretch knowingly violated the employer’s code of conduct and electronic information security policy and in doing so specifically identified one of the employer’s clients, made offensive and vulgar remarks about the client and the client’s staff. In addition, the conduct took place at a time when Ms. Stretch was supposed to be working. To make matters worse, Ms. Stretch attempted to mislead her immediate supervisor into thinking that the conduct had occurred while she was on break. Ms. Stretch’s offensive remarks about the employer’s client were made in a written forum where they could be shared with others and could potentially come to the attention of the employer’s client. While the conduct certainly involved poor judgment, the conduct went beyond that to demonstrate a willful and wanton disregard of the employer’s interests.

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

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 November 19, 2010, reference 01, decision is reversed. 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.

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/kjw