

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TANNA L CALDWELL
Claimant

APPEAL NO. 07A-UI-07348-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PROGRESS INDUSTRIES
Employer

**OC: 07/01/07 R: 02
Claimant: Appellant (1)**

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Tanna Caldwell filed an appeal from a representative's decision dated July 20, 2007, reference 01, which denied benefits based on her separation from Progress Industries. After due notice was issued, a hearing was held by telephone on August 15, 2007. Ms. Caldwell participated personally and offered additional testimony from her legal guardian and conservator, Oliver Caldwell. The employer participated by Kelly Decker, VP for Human Resources, and Amy Smith, Payroll/Human Resources Clerk. Exhibits One through Six were admitted on the employer's behalf.

ISSUE:

At issue in this matter is whether Ms. Caldwell was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Caldwell was employed by Progress Industries from August 6, 1996 until May 18, 2007. She worked full time as a residential instructor. She worked in a group home setting teaching daily living skills to handicapped individuals. Ms. Caldwell was previously a client of Progress Industries due to a mental disability. She has been diagnosed as borderline mentally retarded with respect to verbal skills and slightly above borderline mentally retarded with respect to social skills. She has lived independently for the past 12 years.

Ms. Caldwell was discharged from the employment in 2001 because she was following a coworker to various places and placing telephone calls to her. She grieved the termination and a decision was made to return her to the employment on a "last chance" agreement. She was advised that any further violations of the employer's harassment policy would be grounds for immediate termination.

In December of 2006, the employer gave Ms. Caldwell a verbal warning because of inappropriate comments she was making about her supervisor. She was commenting to others that the supervisor had a nice body. She also bemoaned the fact that the supervisor was not going to be at work and Ms. Caldwell would not, therefore, be able to hear her voice. The coworkers to whom she was making the comments felt uncomfortable and reported the matter to management. Because of the time lapse since the "last chance" agreement, the employer opted to give a verbal warning rather than discharge Ms. Caldwell. She was told to keep her communications with coworkers professional and work-related.

The decision to discharge was based on a report the employer received on or about May 18, 2007. Another employee, Mallory, complained that Ms. Caldwell had sent her inappropriate text messages on May 5, 2007. Mallory had not reported the matter sooner because she was a relatively new employee and was fearful of making a report. Mallory's father indicated he would file a complaint if she did not. Ms. Caldwell initially sent a text message asking Mallory if she wanted to know about the dream she just had. Mallory indicated she did not. Ms. Caldwell sent her a message indicating she dreamed Mallory sat on her lap and the two kissed. Mallory's response was "ha ha, that's weird." Ms. Caldwell then messaged that it was too bad Terry had awakened her because, in her dream, she and Mallory were going to be going downstairs. She asked Mallory not to tell anyone about the messages because she had been written up for such conduct in the past. Approximately 30 minutes after Mallory left work, Ms. Caldwell sent her a text message asking her to come back.

As a result of Mallory's complaint, Ms. Caldwell was discharged on May 18, 2007. The above matters were the sole reason for the separation.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Ms. Caldwell was discharged for sending inappropriate comments to a coworker through text messaging. The administrative law judge appreciates that she has a mental impairment. However, the impairment did not prevent her from understanding the employer's expectations. She asked Mallory not to mention the text messaging comments because she had been written up before for such conduct. This factor persuades the administrative law judge that Ms. Caldwell knew that her actions were contrary to the employer's standards. If she did not know and appreciate the employer's standards, she would not have asked Mallory not to tell anyone and would not have cited the fact that she had previously been written up for inappropriate comments.

Ms. Caldwell knew from the discussion in December of 2006 that she was to keep her communications with coworkers professional and work-related. There was no work-related reason for her to share her dream with Mallory. This is especially true since the dream was sexually suggestive. Her conduct had the potential of subjecting the employer to a claim of sexual harassment. Given the prior warnings Ms. Caldwell had received, the administrative law judge concludes that the conduct of May 5 constituted substantial misconduct. As such, benefits are denied.

DECISION:

The representative's decision dated July 20, 2007, reference 01, is hereby affirmed. Ms. Caldwell was discharged for misconduct in connection with her employment. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly job insurance benefit amount, provided she satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw