

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARQUISA S WASHINGTON

Claimant

APPEAL NO. 12A-UI-11985-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 09/09/12

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 September 25, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 30, 2012. Claimant Marquisa Washington participated. Connie Smith represented the employer. Exhibits One through Six, Eight and Nine 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: Marquisa Washington was employed by the Casey's store in La Porte City as a full-time cashier and cook from 2010 until September 7, 2012 when Store Manager Sara Logan and a representative of the employer's human resources office discharged her from the employment for harassing a coworker. Ms. Logan was Ms. Washington's immediate supervisor.

The conduct that prompted the discharge occurred on August 31, 2012. On that day, Ms. Washington asked coworker Lindsey Monteith to answer the phone and Ms. Monteith refused because she was not yet on the clock. Under the employer's policy, employees were not supposed to answer the phone unless they were on the clock. After Ms. Monteith refused to answer the phone, Ms. Washington told Ms. Monteith that she was going to be angry with all night. Later during the shift, Ms. Washington initiated a conversation about breast implants. Ms. Washington then turned the discussion to the size of Ms. Monteith's breast. Ms. Monteith was uncomfortable with the topic. Two other coworkers were in the vicinity and also noted that Ms. Monteith was uncomfortable with the topic, but that Ms. Washington persisted with the conversation. Ms. Washington then asked Ms. Monteith if she could suck or lick her breasts. Ms. Washington then asked Ms. Monteith if she liked cake and if she wanted to eat cake off Ms. Washington's "ass." Later in the shift, Ms. Washington grabbed a spoon and asked Ms. Monteith if she wanted her to shove the spoon up Ms. Monteith's "ass." Ms. Washington told Ms. Monteith that she would like it. Ms. Washington made additional comments and

gestures, all the while being mindful of how uncomfortable she was making Ms. Monteith. The additional gestures included Ms. Washington miming that she licking her own breasts.

Ms. Monteith and Ms. Washington again worked together the next day. Ms. Washington continued her harassment of Ms. Monteith. When Ms. Washington had Ms. Monteith's attention, Ms. Washington mimed performing fellatio. Later in the evening when Ms. Monteith saw some food sitting by the cash register and asked about it, Ms. Washington asserted that Ms. Monteith was accusing Ms. Washington of stealing food.

Ms. Monteith reported the matter to Ms. Logan on September 3 and provided a written statement. Ms. Washington had earlier heard from another employee that Ms. Monteith was upset and was going to file a complaint about Ms. Washington. On September 3, Ms. Logan suspended Ms. Washington. Ms. Logan then collected written statements from the additional employees who had been present for all or part of the conduct addressed in Ms. Monteith's complaint. The other employees' statements confirmed Ms. Monteith's version of events. Ms. Washington provided her own written statement in which she admitted to some of the conduct, denied other allegations, and characterized her interaction with Ms. Monteith as mutual and light-hearted.

The employer had a written sexual harassment policy. Ms. Washington signed her acknowledgement of the policy in January 2011. The policy prohibited, among other things, unwelcome sexual jokes, flirtations, advances, or propositions, verbal abuse of a sexual nature, graphic verbal comments about an individual's body, and sexually degrading words used to describe an individual.

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).

The weight of the evidence establishes that the events could not have happened as Ms. Washington described them in her testimony. Ms. Washington testified that she had a good relationship with Ms. Monteith and the other coworkers who provided written statements to the employer. Ms. Washington's written statement is inconsistent with the others, while the others are consistent with one another. Though the employer did not have Ms. Washington's coworker's testify, there are a sufficient number of written statements, and sufficient consistency between those statements to rebut Ms. Washington's testimony and to establish that Ms. Washington did indeed engage in a pattern of sexual harassment directed at Ms. Monteith. The conduct spanned two shifts. Ms. Washington had conceded some of the allegations, which lends further credibility to the others. Ms. Washington knew at the time she engaged in the harassing, inappropriate sexual speech and gestures that her actions were in violation of the employer's sexual harassment policy.

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

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 September 25, 2012, reference 01, decision is reversed. 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.

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/css