IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRADLEY P NICHOLSON
Claimant

RUFFALOCODY LLC
Employer

APPEAL NO. 12A-UI-01755-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/08/12
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Bradley Nicholson filed a timely appeal from the February 20, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 29, 2012. Bradley Nicholson participated personally and was represented by attorney William Nicholson. Kelly Henrich, Human Resources Generalist, represented the employer. Exhibit A was 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: The employer contracts with other agencies and institutions to provide fundraising services. Bradley Nicholson was employed by RuffaloCODY, L.L.C., as a part-time non-profit representative from May 2010 until November 21, 2011, when Thomas Wolf, Supervisor, and Brock Ferry, Senior Operations Manager, discharged him from the employment.

The incident that triggered the discharge occurred on November 20, 2011, when Mr. Nicholson posted a message on his personal Twitter account. Mr. Nicholson created the post while he was off-duty and away from the workplace. In the message, Mr. Nicholson referenced the employer, a coworker, and a supervisor by name, as follows:

> @[name of male coworker omitted by administrative law judge] is such a dickskin. One time, he admitted he lost his brown cherry to some other [name of male supervisor omitted by administrative law judge] in the Ruffalocody exec bathroom.

Mr. Nicholson sent the message to the named coworker as an apparent prank.

In an attempt to safeguard its reputation, the employer routinely searches the Internet for references to its name. Mr. Nicholson's post to Twitter was a public tweet and was available to

the public on the Internet. The employer became aware of the tweet within hours of its posting on the public social medium and obtained a copy. When Mr. Nicholson arrived for work the next day, Mr. Wolf and Mr. Ferry, met with him to discharge him from the employment. Mr. Nicholson asserted at that time that the message was intended to be private.

At the time Mr. Nicholson began his employment with RuffaloCODY, he signed a job description document that listed as one of his "essential duties/responsibilities" "Conduct self as a professional representative of RuffaloCODY."

On May 29, 2010, Mr. Nicholson acknowledged in writing his obligation to read the employer's employee handbook and that he had in fact read the handbook. The acknowledgment form states, in relevant part:

> I have read a copy of the RuffaloCODY handbook. I know that I must read the handbook so I understand my rights and responsibilities as an employee of this company."
>
> I understand that the handbook is not an employment contract, but it is an explanation of company policies.

The employer provided Mr. Nicholson with a copy of the handbook to review at the time of his orientation, prior to requesting his written acknowledgment that he had read the handbook. While the employer did not at that time provide Mr. Nicholson with a copy of the handbook to keep, copies of the handbook were available in the workplace and the employer would have provided him with a handbook to keep upon his request.

The handbook contained a section entitled Guidelines for Appropriate Conduct. The policy states, in relevant part:

> As an integral member of the RuffaloCODY team, you are expected to accept certain responsibilities, adhere to acceptable business principles in matters of personal conduct, and exhibit a high degree of personal integrity and professionalism *at all times.*
>
> Types of behavior and conduct that RuffaloCODY considers inappropriate and which could lead to disciplinary action up to and including termination of employment, include but are not limited to the following:
> ...
> Make derogatory remarks to customers, competitors, the public or any public media with regard to the Company, its products or services or other employees of the Company.
>
> Employees should not knowingly or unknowingly engage in acts which could harm the Company's image in the eyes of the public or which could, in any possible way, serve to harm the Company financially or in any other manner.

[Emphasis added.]

Mr. Nicholson had a couple prior, unrelated reprimands, but had no prior reprimands for conduct similar to that that prompted his discharge from the employment.

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).

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).

Violation of a specific work rule, even off-duty, can constitute misconduct sufficient to disqualify a claimant from unemployment insurance benefits, provided the employer has a work rule that covers the off-duty conduct.. See Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992).

The weight of the evidence establishes misconduct in connection with the employment. The employer's written policy was sufficient to put Mr. Nicholson on notice of his obligation to refrain from making derogatory remarks about the employer or staff *at all times*, regardless of whether the comments were made at work during working hours or away from the workplace and outside working hours. Mr. Nicholson's tweet was posted in a public forum. Only because the tweet was posted in a public forum did the tweet come to the employer's attention and was the employer able to get a copy. If the publicly post tweet was available to the employer, it was available to anyone else with Internet access, including the employer's customers and staff. The employer does not have to prove actual harm to prove violation of policy or willful disregard of its interests. The substance of the tweet specifically connected it to the employer and the employment. The tweet spoke of inappropriate sexual conduct involving two male RuffaloCODY employees, one a member of management, and represented that the conduct had occurred at the RuffaloCODY workplace. Mr. Nicholson's decision to send the post and action in sending the post was in willful and wanton disregard of the employer's interest in preserving its reputation. In drafting and sending the post, Mr. Nicholson violated the employer's written policy and the standards of conduct the employer reasonably expected of him.

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

One matter of further note. The record will reflect that during the appeal hearing, the claimant's counsel could be heard in multiple instances whispering a suggested response to the claimant while the claimant was testifying in response to the administrative law judge's questions.

DECISION:

The Agency representative's February 20, 2012, reference 01, decision is affirmed. 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.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/pjs