

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHRISTINA M HEATH
Claimant

APPEAL 15A-UI-04849-KC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 03/29/15
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 13, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 1, 2015. The claimant participated. The claimant changed her last name to Ross after the hearing notice was mailed. The employer participated through Curt Fox, District Manager. Employer's Exhibits One – Two were received into evidence.

ISSUE:

Was the claimant discharged for work-related, disqualifying misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a first assistant manager beginning October 23, 2013. The last day that she worked was April 1, 2015, and she was separated from employment on April 6, 2015, when the employer terminated her employment.

The underlying legal matter involving activity the claimant was engaged in before the employer hired her involved an investigation by the Iowa Department of Human Services (DHS). Nothing about the DHS investigation was entered into evidence.

Weeks before the separation, the employer learned of the claimant's criminal charge for sexual exploitation by a counselor through a newspaper article and customer statements. Teresa Durlam, the claimant's store manager asked the claimant about the situation and told the claimant that if she was convicted the employer would terminate her employment.

The employer received customer comments that they were uncomfortable because of her past conduct. The claimant's position with the employer required daily interaction with the public at the cash register and with employees in the kitchen and throughout the store.

On March 27, 2015, the claimant attempted to enter a guilty plea to a serious misdemeanor but the judge would not permit her to do so. The employer understood from the claimant that she intended to plead guilty to the charge and relied on her statements in their decision-making.

Following an internal investigation, Fox and area supervisor Joanne Mahoney decided to terminate the claimant's employment based on public records that indicated the claimant had been charged with exploitation by a counselor in her previous employment. Fox and Mahoney determined the claimant's prior conduct violated the employer's policy in the employee handbook including the code of conduct regarding inappropriate or unprofessional behavior, section 34.9(b) regarding compliance with all laws. The employer did not submit the relevant handbook provisions at the hearing.

The claimant completed an application in 2013. The application contains a question about whether the applicant has been convicted of anything. She indicated that she had not. At the time, her answer was accurate. The claimant reviewed a copy of the employee handbook and signed a statement to that effect on October 23, 2013.

On April 1, 2015, the claimant met with Mahoney who discharged her from employment based on pleading guilty to a serious misdemeanor of sexual exploitation by a counselor or therapist. The Corrective Action Statement of April 1, 2015 indicates that her prior behavior violated multiple company policies and the code of conduct and ethics. Her conduct was also identified as non-conducive to business. The claimant signed the statement on April 1, 2015. (Exhibit Two) At the time of termination, the claimant had not been convicted of a serious misdemeanor.

The employer submitted certain employment documents at hearing but did not submit the relevant portions of the handbook or code of conduct on which the employer relied, according to testimony, for termination. When asked, the employer's witness would not paraphrase the relevant portions of the code of conduct and employee manual on which the termination was purportedly based. The employer did not establish that the claimant could have known that her behavior, prior to her current employment with the employer, could result in termination.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the

nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Mindful of the ruling in *Crosser*, *id.*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The current act on which the employer relied, when it made its determination to terminate the claimant's employment, was that she had been convicted. She had not been convicted. While the employer relied on the claimant's statement that she intended to plead guilty, the judge did not accept the plea agreement. Consequently, the employer acted before a conviction had been obtained. There was no final incident in this case before the employer terminated the claimant's employment.

In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. ___, (Iowa Ct. App. filed ___, 1986). The employer chose to terminate the claimant for a past act that occurred prior to her most recent employment with Casey's General Stores and prior to a conviction on the charge.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation.

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. The employer did not establish that the claimant knew she could be discharged for prior conduct that was unrelated to the current employment.

The claimant received conflicting information from the employer about her legal situation. After advising a supervisor of the situation, she was told that her employment would be terminated if she was convicted. Later, her employment was terminated when she had not been convicted.

The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined.

While the employer experienced adverse customer response to news items regarding the claimant's charge, not conviction, of a serious misdemeanor, the employer did not identify that as the sole basis for termination and it failed to establish that the claimant was convicted at the

time of termination, the purported primary basis for termination. As it relates to disqualification for unemployment insurance benefits for the claimant, the employer has not met its burden of proof. Benefits are allowed.

DECISION:

The April 13, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Kristin A. Collinson
Administrative Law Judge

Decision Dated and Mailed

kac/mak