IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TANYA R HANSON Claimant **STELLAR INDUSTRIES INC** Employer	**APPEAL 15A-UI-07655-KC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/14/15** **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 June 30, 2015, (reference 01) unemployment insurance decision that denied benefits for conduct not in the best interest of the employer. The parties were properly notified about the hearing. A telephone hearing was held on August 7, 2015. The claimant participated. The employer participated through Ms. Leanne Van Oort. Exhibit 1 was 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 began her employment with Stellar Industries full-time as a janitor on November 3, 2014. She was separated from employment on June 17, 2015, when her employer terminated her employment. That was the last day that she worked. On June 17, 2015, Steve Sheeders, Operations Manager, met with the claimant regarding termination due to complaints that she engaged in harassing behavior. The claimant had received warnings regarding her behavior and participated in employer-sponsored training about how to maintain a harassment-free workplace.

On April 13, 2015, the employer hired consultant, Steven Palmer due to the employer's receipt of multiple employee complaints about uncomfortable interactions between co-workers. The claimant was one of the employees that co-workers had complained about. Palmer interviewed various employees about their roles in various complaints, including the claimant and Brandie Cuellar. The consultant recommended training regarding workplace harassment, even if the behavior occurred outside the workplace. On June 3, 2015, all available employees, including the claimant, participated in a training regarding preventing harassment in the workplace.

The consultant's conclusions were that the claimant was one of the sources of conflict in the employer's facility. The consultant identified one of the employer's options as termination of the claimant's employment. The employer provided no evidence of the consultant's educational and experiential expertise. Thereafter, on June 5, 2015, Van Oort met with the claimant and discussed the harassment issues and complaints.

On June 5, 2015, the employer initiated a disciplinary action based on the complaint of a co-worker, David Tracy, that the claimant was harassing him. Tracy and the claimant had a previous relationship involving children. He filed a complaint with the police on June 5, 2015 regarding what he thought was the claimant's harassing behavior at work. He also reported feeling uncomfortable and afraid to be at work. Tracy said that the text messages he received from the claimant he believed were threatening and her driving by his area felt like she was stalking him. They worked different shifts but there was a brief time period overlapping between the beginning and ending of their respective shifts during which they could interact. The claimant cleaned the building in which Tracy worked. The claimant lived on the same street as the employer's facility was located and her home was in close proximity to the employer's facility. The same road contains the claimant's physician's office, her Laundromat, and the route she takes to see her parents. The employer's IT manager reviewed Tracy's text messages from the claimant. Tracy also asked to bring in a gun to work because he had a concealed weapons permit. His request was denied. Van Oort received no information about any specific threat that the claimant allegedly relayed in the text messages.

On June 5, 2015, Van Oort met with the claimant and discussed what Tracy and another co-worker identified as harassment. Van Oort told the claimant that while her cleaning work was good if there were any further reports of harassment her employment would be terminated. Tracy had filed a complaint with the police who had attempted to reach the claimant and left messages about not contacting Tracy. Van Oort praised the claimant's work but focused on her avoidance of harassing behavior in the workplace or outside the workplace with co-workers. Van Oort gave the claimant a written warning that indicated if she was involved in any future harassment, her employment would be terminated. The employer would not tolerate any harassment in the workplace because employees need to be and feel safe. The claimant asked Van Oort why the harassment training was scheduled. Van Oort indicated it was because of multiple complaints between employees.

The employer's IT manager reviewed the text messages that Tracy received from the claimant. The IT manager told Van Oort that the claimant's text language to Tracy was vulgar. No specific information was relayed to the employer about any alleged threats from the claimant's texts. The employer relayed no specific threat allegations to the claimant.

The second complaint was by Brandie Cuellar, a female co-worker in the same building. The claimant reportedly had been threatening to the co-worker when she tried to enter the co-worker's house on June 15, 2015. Cuellar locked the door so the claimant could not enter Cuellar's home. The claimant was seen opening Cuellar's garage door then driving away. Cuellar alleged discomfort in interacting with the claimant at work as well because the claimant had tried to show her a nude photograph of another employee. Cuellar tried to avoid the claimant at work because she felt threatened by her. The employer did not call Cuellar as a witness at hearing.

On June 16, 2015, Van Oort received two e-mail messages regarding the claimant's conduct. Cuellar contacted Van Oort with a complaint of harassment. Tabatha Larsen, a robot welder, reported that the claimant told Larsen's husband Neil at their shared workplace that Tabatha

was more than a friend with another welder. Neil Larsen acknowledged that the claimant had made the statement at work, although he denied any belief in the claimant's statements. At that point, Van Oort started preparing termination documents regarding the claimant.

Van Oort received an e-mail from employee, Jessie Heffner, complaining that the claimant had contacted his wife and asserted that he was more than friends with Cuellar. Van Oort did not offer that into evidence and did not show it to the claimant.

The claimant asked Van Oort where Tracy's documents were that he filed with the police or the employer regarding her allegedly harassing behavior. Van Oort denied having access to any such documents. She referred to the IT manager's review of the claimant's texts to Tracy but could not identify any specific threat. Van Oort confirmed with the police that Tracy had filed a complaint and they had communicated with the claimant. The claimant requested a copy of any documents from co-workers that indicated the claimant was violent or harassing. She did not receive those documents from the employer. Van Oort denied having such documents.

The claimant asked Van Oort whether the employer received a written complaint from all three witnesses on which the employer wanted to rely, despite their lack of participation at the hearing. She also asked the employer to demonstrate any such corresponding statements. The claimant did not receive the requested information. She also received no documents regarding the time and basis for any further action.

On June 5, 2015, the claimant was interviewed by Van Oort. The claimant thought the investigation was not consistent with the terms of the employer's policy regarding investigations of workplace violence prevention, employee conduct and disciplinary action, and harassment. (Exhibit 1).

The claimant sent text messages to David Tracy regarding the end of their personal relationship. Tracy also sent text messages to the claimant. The claimant denied sending threatening text messages to Tracy. The claimant sent text messages to Tracy on her own time regarding an ongoing interpersonal matter in May and June of 2015.

The claimant disputed the employer's assertion that the employer only had the harassment training based on her behavior. She testified to having experienced annual harassment training by the employer in prior years.

REASONING AND CONCLUSIONS OF LAW:

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

The employer provided limited documentation and testimonial evidence in support of alleged specific events that caused the employer to determine the claimant had violated company policy such that termination was the sole response.
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). It is permissible to infer that the employer's alleged employee harassment records were not submitted because they would not have been supportive of the employer's position. See, *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the situation regarding specific harassment incidents. The employer's representative could not identify any specific threat that the claimant reportedly made despite the employer's IT Manager reviewing the complaining witness's cell phone for the claimant's texts. No request to continue the hearing was made. Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. 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:
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> 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.
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> 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.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). 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).

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 assess points or impose discipline up to or including discharge for the incident under its policy.

The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed. Because the act for which the claimant was discharged was not current and the claimant may not be disqualified for past acts of misconduct, benefits are allowed. 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.

DECISION:

The June 30, 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. Any benefits claimed and withheld on this basis shall be paid.

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Kristin A. Collinson
Administrative Law Judge

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Decision Dated and Mailed

kac/pjs