IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KARL LAUBENGAYER
Claimant

VERIZON BUSINESS NETWORK SERVICES INC
Employer

APPEAL NO. 09A-UI-01761-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/16/08 R: 03
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Karl Laubengayer filed a timely appeal from the January 26, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 25, 2009. Mr. Laubengayer participated. Imogene Johnson, Senior Consultant for Human Resources, represented the employer and presented additional testimony through Jeffrey Nelson, Sales Manager.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Karl Laubengayer was employed by Verizon Business Network Services as a full-time Account Manager II from May 19, 2008 until October 28, 2008, when Jeffrey Nelson, Sales Manager, and Imogene Johnson, Senior Consultant for Human Resources, discharged him from the employment. Mr. Nelson was Mr. Laubengayer's immediate supervisor. Mr. Laubengayer's duties as an Account Manager involved soliciting sales from an assigned customer base.

The incident that prompted the discharge came to the employer's attention on October 23, 2008. On that day, Mr. Nelson discussed with a customer a transition process whereby Mr. Laubengayer would become the Account Manager assigned to the customer's account. The customer told Mr. Nelson that arrangement would not be acceptable. The customer referenced offensive conduct on the part of Mr. Laubengayer during a meeting that had occurred two weeks earlier as the basis for the customer's decision. The customer declined to provide additional details and referred the employer to Mr. Laubengayer for those details. The employer continues to have a relationship with the customer, but the employer provided no testimony or statement from the customer for the hearing.

On or about October 9, 2008, Mr. Laubengayer and coworker Jeff Parker participated in a two-hour meeting with the customer in question. During a break in the meeting, Mr. Laubengayer reviewed his e-mail messages on his cell phone. Mr. Laubengayer had received an e-mail message that included photos of an adult male in various Halloween costumes. One costume was of the male in a woman's one-piece swim suit. Another photo was of the same adult male in a costume designed to look like a giant genie's lantern. The costume included an oversized handle on the back and an oversized lantern spout on the front. Mr. Laubengayer shared the photos with his colleague, Mr. Parker. While Mr. Laubengayer was reviewing his email, including the photos, the customer inquired whether the phone Mr. Laubengayer was using was a new phone offered by Verizon. Mr. Laubengayer indicated it was not. Mr. Laubengayer then shared with the customer photos of Mr. Laubengayer's family and the photos of the adult male in the various Halloween costumes. Mr. Laubengayer did not consider that it might be inappropriate to share the photos or that the customer might deem the photos offensive. The customer did not indicate at the time that she found the photos offensive. The customer did not mention the matter to the employer until the October 23 conversation with Mr. Nelson.

On October 23, after Mr. Nelson consulted with Imogene Johnson, Senior Consultant for Human Resources. Mr. Nelson interviewed Mr. Laubengayer regarding the customer's complaint that he had engaged in offensive conduct at the prior meeting. Mr. Laubengayer was unable at first to recall anything he might have done that would have been offensive to the customer. Mr. Laubengayer mentioned sharing the photos and offered that the location of the spout on the genie lantern costume may have been perceived as suggestive of a phallus. Mr. Laubengayer agreed to locate the e-mail message that contained the photos. Mr. Laubengayer subsequently reported that he could not locate the message and must have deleted it earlier. Mr. Laubengayer asked whether he should resign in light of the offended customer.

As part of his investigation, Mr. Nelson spoke with employee Jeff Parker. Mr. Parker told the employer he remembered Mr. Laubengayer sharing photos at the meeting, but could not recall details about the photos. Mr. Nelson also spoke to employee Mark Lafferty. Mr. Lafferty reported that Mr. Laubengayer had forwarded photos to him, but that he had since deleted them and could not recall details of the photos. Mr. Parker and Mr. Lafferty continue with the employer, but did not testify or provide a statement for the hearing.

When Mr. Nelson spoke with Mr. Laubengayer on October 23 about the meeting that had occurred two weeks prior, Mr. Nelson asked Mr. Laubengayer whether he recalled doing anything that might have offended the client. Mr. Laubengayer did not. Mr. Nelson and Mr. Laubengayer then brainstormed together what had transpired at the meeting and the discussion settled on the photos Mr. Laubengayer had shared. As Mr. Nelson and Mr. Laubengayer discussed the photos, Mr. Laubengayer offered that the spout on the genie costume was in the front of the costume and may have been suggestive of a phallus.

Mr. Nelson and Ms. Johnson each consulted their immediate superior to assist with reviewing the matter and making a decision about Mr. Laubengayer's continued employment. The employer ultimately concluded that Mr. Laubengayer had violated the employer's policy against sexual harassment and the employer's code of conduct that required professional conduct when interacting with customers as a representative of the employer.

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).

The evidence in the record establishes that Mr. Laubengayer exercised very poor judgment or a lack of judgment when he decided to share the photos with the customer on October 9, 2008. The weight of the evidence does not support the employer's assertion that there was a sexual harassment component to the conduct. The evidence indicates instead that Mr. Laubengayer did not consider beforehand whether the photos might be perceived as inappropriate or offensive. In addition, the weight of the evidence indicates that Mr. Laubengayer had no intent to act against the interests of the employer.

While the decision to discharge Mr. Laubengayer was within the discretion of the employer, the administrative law judge concludes that Mr. Laubengayer's indiscretion did not rise to the level of substantial misconduct that would disqualify him for unemployment insurance benefits. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Laubengayer was discharged for no disqualifying reason. Accordingly, Mr. Laubengayer is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Laubengayer.

DECISION:

The Agency representative's January 26, 2009, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs