

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GERALD J MILLER
Claimant

APPEAL NO. 11A-UI-07073-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

STREAM INTERNATIONAL INC
Employer

OC: 04/17/11
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 May 16, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 12, 2011. Claimant Gerald Miller did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Stacy Albert, Human Resources Generalist, represented the employer and presented testimony through Andrew Eberhardt, Service Delivery Manager, and Debbie Nelson, Human Resources Manager. Exhibit One 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: Gerald Miller was employed by Stream International as a full-time Team Manager from 2008 until April 20, 2011, when Andrew Eberhardt, Service Delivery Manager, and Debbie Nelson, Human Resources Manager, discharged him for violating the employer's written fraternization policy. The policy prohibited social and/or romantic relationships between managers and direct or indirect subordinates. The stated purposes of the policy included protecting employee morale, discouraging favoritism, and avoiding possible claims of sexual harassment. A separate sexual harassment policy included the followings as behavior that could constitute sexual harassment: sexual flirtations, advances, propositions, as well as verbal or written comments, jokes, teasing and/or other communication of a sexual nature. Mr. Miller, as a Team Manager, was responsible for not only knowing the policies, but was charged with facilitating enforcement of the policies as well.

On April 20, a female employee who reported directly to Mr. Miller brought to the employer's attention text messages that Mr. Miller had been sending to another female employee who also reported directly to Mr. Miller. The employer spoke to the young woman with whom Mr. Miller had been corresponding and obtained a copy of the text messages. The young woman who received the messages from Mr. Miller did not wish to get him in trouble, but was uncomfortable

with some of the correspondence. The text messages suggest the young woman had been a willing participant in the correspondence with Mr. Miller. There were more than 200 text messages between Mr. Miller and the young woman he supervised. The employer determined that approximately one-fourth of the correspondence occurred while Mr. Miller was on the clock. The text messages occurred over the course of a few days, from April 15 until the early hours of April 18, 2011. In one message, Mr. Miller tells the young woman, "Might as well tell your boyfriend that he is being replaced." The correspondence continues to a discussion of Mr. Miller sharing the young woman with her boyfriend and a discussion of the young lady and her mother sharing Mr. Miller. The correspondence continues with the same current of sexual innuendo with reference to the difference in age between the two. Mr. Miller is in his late 40s and the young woman was 18. The correspondence continues with a sexually suggestive reference to Mr. Miller's "motives" for carrying on the correspondence.

The employer spoke to Mr. Miller on the April 20 and he acknowledged having engaged in "banter" with the young woman. The employer concluded that the conduct was in violation of the fraternization policy and discharged Mr. Miller 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).

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 weight of the evidence in the record establishes that Mr. Miller knowingly and intentionally violated the employer’s fraternization policy. Mr. Miller engaged in ongoing text messaging with a young woman he supervised. The text messaging consisted to a great extent of sexual innuendo of one form or another. The weight of the evidence indicates that Mr. Miller knew he was violating the employer’s policy as he carried on the correspondence, but engaged in the correspondence nonetheless to satisfy his desire for titillation. In the correspondence, Mr. Miller makes clear his desire to take the relationship further and makes clear that his intentions are sexual in nature. This is precisely the sort of trajectory the employer’s fraternization policy was intended to thwart. Mr. Miller’s conduct was in willful and wanton violation of the employer’s interest.

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

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 May 16, 2011, reference 01, decision is reversed. 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.

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/pjs