IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MICHELLE M BENEGAS
Claimant

VAN DIEST SUPPLY CO
Employer

APPEAL NO. 13A-UI-02895-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/03/13
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Michelle Benegas filed a timely appeal from the March 6, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 8, 2013. Ms. Benegas participated personally and was represented by Attorney Neven Mulholland. Attorney Jeffrey Krausman represented the employer and presented testimony through Carolyn Cross, Chris Pettigrew, Rose Wood, Kevin Spencer, and Lee Trask. Witness John Reed testified at the request of the administrative law judge. Exhibits One, Two, Five, Six and Seven were received into evidence. There was no Exhibit Three or Four. Exhibit A was withdrawn.

ISSUE:

Whether Ms. Benegas was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Michelle Benegas was employed by Van Diest Supply Company as a full-time production operator from 1997 until February 8, 2013, when the employer discharged her for comments she made to and about a coworker. Ms. Benegas and Chris Pettigrew went to high school together in Fort Dodge. Both are in the early 40s. Mr. Pettigrew is African American. Ms. Benegas is Caucasian. Mr. Pettigrew had only been with Van Diest Supply a short time when Ms. Benegas was discharged. Ms. Benegas and Pettigrew sometimes worked together as part of a production line group that included coworkers Rose Wood, John Reed, and another coworker, Antonio.

The employer has a written harassment policy that prohibits harassment on the basis of sex, race, color, religion, national origin, age, disability or other protected class. The harassment policy indicates that an employee who engaged in harassment would be subject to discipline up to immediate termination of the employment. The employer had other written policies that addressed harassment or other inappropriate conduct directed at coworkers. The Team Member Conduct policy prohibited behavior that was "offensive to others." The same policy prohibited behavior that was, "Harassing, threatening, intimidating, bullying, coercing or

interfering with any Team Member, customer or visitor." Ms. Benegas was aware of the policies and had most recently received a copy of the handbook containing the policies in January 2012.

On February 6, 2013, Ms. Benegas was working as part of the production group with Mr. Pettigrew, Ms. Wood, Mr. Reed, and another employee, Antonio. During the shift, Ms. Benegas needed to give direction to Mr. Pettigrew. Such directions would involve raising and lowering the weights of product to ensure the proper quantity of product was packaged. In the course of giving such direction on that day, Ms. Benegas would say such things as, "Boy, lower the weights" and "Boy, higher the weights." Mr. Pettigrew did not hear the "Boy" portions of these utterances, but Ms. Wood, who was working within a few feet of Ms. Benegas, did hear them and interpreted them as racial and derogatory. Toward the end of the shift, the team had to decide whether they were going to complete another pallet of product. When John Reed asked Ms. Benegas whether they should do another pallet, Ms. Benegas responded, "I don't know. Ask that boy." The reference was to Mr. Pettigrew. Mr. Pettigrew and Ms. Wood both heard the remark. Mr. Pettigrew interpreted the comment as a racial slur. When Mr. Pettigrew called Ms. Benegas' name to get Ms. Benegas' attention and further discuss the comment, Ms. Benegas ignored Mr. Pettigrew's attempts to get her attention. After that incident and one three weeks earlier, Mr. Pettigrew decided to complain to the employer.

Three weeks earlier, Mr. Pettigrew had been working with Ms. Benegas. During that shift, Ms. Benegas called Mr. Pettigrew a "stupid motherfucker," "stupid ass," and "dumbass." Mr. Pettigrew spoke to Ms. Benegas regarding the comments. Mr. Pettigrew told Ms. Benegas that they went too far back with one another to play such games and that he did not play such games. Ms. Benegas did not speak to Mr. Pettigrew again until March 6, 2013.

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).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. Deever v. Hawkeye Window Cleaning, Inc. 447 N.W.2d 418 (Iowa Ct. App. 1989).

Ms. Benegas has provided a highly implausible explanation for the comments she directed at Mr. Pettigrew on February 6, 2013. To find Ms. Benegas' explanation credible, one would have to be convinced that Ms. Benegas, a woman in her 40s, has managed to live that long blindly ignorant of all public and private discourse on race relations and racial discrimination. The weight of the evidence in the record does not support such a leap from reality. The weight of the evidence indicates that Ms. Benegas felt, early on in Mr. Pettigrew's employment, that she could treat him with disrespect, as inferior to herself. She started by calling him patently offensive and demeaning names: "stupid motherfucker," "stupid ass," and "dumbass." When Mr. Pettigrew raised an objection to such treatment, Ms. Benegas decided not to speak to him at all for an extended period. When Ms. Benegas next spoke to Mr. Pettigrew, on February 6, she again elected to interact with Mr. Pettigrew in a patently offensive manner, repeatedly referring to him as "boy." Ms. Wood immediately recognized the utterances as racist because they were racist. The word boy, when directed at a grown man, always has the potential to be offensive. The word boy, when directed at an African American man, carries a racist

component that communicates to the man that he is the social inferior of the person making the utterance. Ms. Benegas knew what she was doing. This explains why she did not acknowledge Mr. Pettigrew when he began to take issue with her utterances. It explains why she provided the employer with an implausible explanation of why she used the term. It explains why she enlisted Mr. Reed to write a statement about a conversation he did not hear. Ms. Benegas knowingly and intentionally violated the employer's harassment policy. The conduct was in willful and wanton disregard of the employer's interest in maintaining a civil workplace free of harassment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Benegas was discharged for misconduct. Accordingly, Ms. Benegas is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Benegas.

DECISION:

The Agency representative's March 6, 2013, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/css