

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MITCHELL L WILLIMACK
Claimant

APPEAL NO. 11A-UI-06573-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MENARD INC
Employer

OC: 04/24/11
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 12, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 14, 2011. Claimant Mitchell Willimack participated. Store Counsel Paul Hammel represented the employer and presented testimony through General Manager Gus Gerken and First Assistant General Manager Kimberle Clark. Exhibits One through Four were 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: Mitchell Willimack began work for Menard, Inc. in 2006. At the end of the employment, Mr. Mitchell worked as the full-time Assistant Hardware Department Manager at the Cedar Rapids South store. Mr. Willimack last performed work for the employer on Monday, April 18, 2011. On that day, Store Manager Gus Gerken suspended Mr. Willimack for three days. On April 22, 2011, Mr. Gerken discharged Mr. Willimack from the employment for being intentionally dishonest during the employer's investigation into whether Mr. Willimack had sexually harassed multiple female employees.

On Sunday, April 17, 2011, a female employee of the hardware department contacted First Assistant General Manager Kimberle Clark with regard to a nude photo of Mr. Willimack that Mr. Willimack had sent to the Assistant Office Manager via his cell phone. The Assistant Office Manager was apparently a willing recipient of the nude photo. The Assistant Office Manager had shared the photo with other female employees, one of whom was the employee who complained to Ms. Clark. The employer initiated an investigation into whether Mr. Willimack had engaged in inappropriate conduct directed toward coworkers, including whether he had violated the employer's policy against harassment. At the time the employer commenced the investigation, the employer had information suggesting that Mr. Willimack had sent unsolicited and inappropriate text messages to two cashiers.

The employer briefly interviewed Mr. Willimack at the start of the investigation. Mr. Willimack denied sending the nude photo to the Assistant Office Manager. Mr. Willimack denied sending text messages to the cashiers. Mr. Willimack knew at the time he made these denials that what he was telling the employer was untrue.

After the employer spoke with the cashiers involved in the allegations, the employer conducted an extensive, two-hour interview with Mr. Willimack. Mr. Willimack continued to deny that he had sent the photo to the Assistant Office Manager or had sent text messages to the cashiers. In addition, Mr. Willimack made up a story that he told to the employer about his ex-girlfriend or ex-wife hacking into his phone and/or Facebook account and asserted that any inappropriate transmissions came from his ex-wife, not him. At the end of the interview, Mr. Gerken placed Mr. Willimack on a three-day suspension while the employer continued to investigate the matter.

On Friday, April 22, 2011, Mr. Willimack returned to the workplace. In connection with his return to the workplace, Mr. Willimack confessed to Mr. Gerken that he had been dishonest with the employer during the prior interviews and that he had made up the story about his ex hacking into his phone and/or Facebook account. Mr. Gerken proceeded that day with discharging Mr. Willimack based on his dishonesty during the course of the employer's investigation.

As a member of the management team, Mr. Willimack had an obligation not only to cooperate with the employer's investigation into the harassment allegations, but also an obligation to facilitate the investigation. These obligations were spelled out in the employer's harassment policy. Mr. Willimack was aware of the policy, but nonetheless intentionally interfered with the employer's investigation into the matters.

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. Willimack acted with wanton and willful disregard of the employer's interests when he was intentionally dishonest with the employer during the employer's investigation into whether he had harassed multiple coworkers. The employer had a right and obligation to maintain a safe, civil work environment, free of sexual harassment or other harassment. Mr. Willimack was well aware of the employer's harassment policy and his duty as a manager, not only to refrain from harassing conduct, but to cooperate with and facilitate investigations into harassment allegations. Mr. Willimack's intentional dishonesty went beyond a mere denial and included a completely bogus story of how another person had committed the conduct the employer was investigating.

The administrative law judge would note, as he did during the hearing, that Mr. Willimack's testimony consisted of stonewalling and contradictory statements. Mr. Willimack interfered with the hearing process in the same manner in which he interfered with the employer's investigation.

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

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 12, 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. The employer's account will not be charged.

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/kjw