IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RENEE R STEGGALL
Claimant

CEI EQUIPMENT COMPANY INC
Employer

APPEAL NO. 11A-UI-16574-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/16/11
Claimant: Respondent (2-R)

Section 96.5(2)(a) – Discharge for Misconduct
Section 96.6-2 – Timeliness of Protest

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 21, 2011, reference 03, decision that allowed benefits and that found the employer's protest untimely. After due notice was issued, a hearing was held by telephone conference call on January 30, 2012. The claimant participated. Karen Geddes represented the employer and presented additional testimony through Kim Hurlbert and Todd Evan. Department Exhibit D-1 was received into evidence.

ISSUE:

Whether the employer's protest of the claim for benefits was timely.

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: On December 5, 2011, Iowa Workforce Development mailed a notice of claim concerning the above claimant to the employer's address of record. The notice of claim contained a warning that any protest must be postmarked, faxed, or returned by the due date set forth on the notice, which was December 15, 2011. The notice of claim was received at the employer's address of in a timely manner, prior to the deadline for protest. On December 8, 2011, the employer completed its protest information on the form and faxed it to Workforce Development. The faxed protest materials consisted of a single page. Workforce Development received the single-page protest, but misplaced it.

Renee Steggall was employed as a full-time draftsperson from September 12, 2011 until October 18, 2011, when Todd Evan, general manager, discharged her from the employment. Ms. Steggall worked in the employer's engineering department. Gary Sams was Ms. Steggall's immediate supervisor.

On October 7, 2011, Ms. Steggall was absent from work and failed to notify the employer of her need to be absent until more than two hours after the scheduled start of her shift. The employer's handbook required that Ms. Steggall notify the employer by the scheduled start of her shift. Human Resources Representative Kim Hurlbert reminded Ms. Steggall of the

absence notification policy when Ms. Steggall finally called in. Ms. Steggall chose at that point to assert that no one in the workplace liked her. Ms. Steggall asserted that no one would speak to her. Ms. Hurlbert indicated that she did not know what Ms. Steggall was referring to, but added that Mr. Evan and the company owner had been looking for Ms. Steggall that morning. Ms. Steggall responded to that statement that she did not know why they would care whether she was there and further asserted that no one talks to her. When Ms. Ms. Hurlbert concluded the conversation was done, she ended the call. Ms. Steggall called back to instigate conflict with Ms. Hurlbert. Ms. Steggall asserted that Ms. Hurlbert had hung up on her and asserted that Ms. Hurlbert had been rude. Ms. Hurlbert told Ms. Steggall that she had only wanted to enforce the attendance policy.

Despite being a new employee, Ms. Steggall was rude and disrespectful to coworkers and superiors. On the morning of October 18, General Manager Todd Evan approached Ms. Steggall's work area to find out why her computer monitor was not positioned on her desk the way it was supposed to be. Ms. Steggall had previously balked at a more senior coworker's directive that she reposition her monitor to comply with the employer's policy. As Mr. Evan left Ms. Steggall's work area, Ms. Steggall laughed at him. The employer had become aware that Ms. Steggall was engaging in inappropriate use of the computer and wanted it positioned so that others could monitor her use of the computer.

The employer had become aware of e-mail messages Ms. Steggall had sent to a male coworker in the parts department. In the messages, Ms. Steggall referred to Human Resources Representative Kim Hurlbert and Receptionist Susan Greenlee as "cougars," women on the prowl for younger men. Ms. Steggall had asserted in her e-mails that Ms. Hurlbert and a male coworker were in a romantic relationship. In her e-mail correspondence to the male coworker, Ms. Steggall use pet names for other coworkers. Ms. Steggall told the male coworker he could not correspond with him because "the hag," meaning C.F.O. Karen Geddes, had directed her to reposition her monitor. These included old hag, harlot, and spineless. Ms. Steggall used the work computer to set up after-hours dates with the male coworker. Despite being a new employee, Ms. Steggall's presence was disruptive to the workplace.

Ms. Hurlbert, Mr. Sams, and Mr. Evan met with Ms. Steggall on October 18 to discuss with her the various ways she was disrupting the workplace and her dramatic change in demeanor since she had been hired for the position. Ms. Steggall professed ignorance of the multiple concerns the employer was trying to address with her and responded repeatedly with, "I don't know what you're saying" or "I don't know what you're talking about."

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.35(1) provides:

> (1) Except as otherwise provided by statute or by department rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the department shall be considered received by and filed with the department:
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> a. If transmitted via the United States postal service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

b. If transmitted by any means other than the United States postal service or its successor, on the date it is received by the department.

871 IAC 24.35(2) provides:

(2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.

a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

b. The department shall designate personnel who are to decide whether an extension of time shall be granted.

c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.

d. If submission is not considered timely, although the interested party contends that the delay was due to department error or misinformation or delay or other action of the United States postal service or its successor, the department shall issue an appealable decision to the interested party.

Iowa Code section 96.6-2 provides in pertinent part:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant.

The weight of the evidence in the record establishes that employer's one-page protest was most likely received on December 8, 2011 and misplaced by Iowa Workforce Development staff, rather than docketed. The employer's protest was timely. The administrative law judge has jurisdiction to rule on the merits of the employer's protest and the claimant's separation from the employment.

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.
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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.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The

administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The weight of the evidence establishes that Ms. Steggall was repeatedly instructed to position her computer monitor so that others in the workplace could discern whether the computer was being used for work-related or non-work-related purposes. The employer's directives about the monitor were reasonable. The employer reasonably expected that the work computer would be used only for authorized work-related activity. The employer reasonably expected to be able to monitor the conduct of all of its employees, including Ms. Steggall, to ensure compliance with established work rules. Ms. Steggall repeatedly failed to reposition her monitor, or failed to leave her monitor in the proper position as instructed. Ms. Steggall balked at a senior coworker's directive that she reposition the monitor. Ms. Steggall used the computer to send offensive comments about Ms. Geddes after Ms. Geddes told her to reposition the monitor. Ms. Steggall laughed at Mr. Evan when he came to discuss the problem with keeping the monitor in its proper position. The employer's concern about Ms. Steggall's use of the work computer was well founded. Ms. Steggall had repeatedly used the computer to send messages containing disparaging and demeaning remarks about other staff. Ms. Steggall's conduct amounted to insubordination. Ms. Steggall's unauthorized use of the work computer, along with her other disruptive behavior, was in wanton and willful disregard of the employer's interest in maintaining a civil, productive workplace.

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

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 December 21, 2011, reference 03, decision is reversed. The employer's protest was timely. 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.

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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw