

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LORI R STARR
Claimant

APPEAL NO. 15A-UI-03182-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TSC INDUSTRIES INC
Employer

OC: 10/05/14
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.6(4) – Previously Adjudicated Issue

STATEMENT OF THE CASE:

Lori Starr filed a timely appeal from the March 4, 2015, reference 05, decision that disqualified the claimant for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that she had been discharged on February 8, 2015 for misconduct in connection with the employment. After due notice was issued, a hearing was held on April 16, 2015. Ms. Starr participated. Michele Hawkins of Equifax represented the employer and presented testimony through Matt Timm. Exhibits One, Two, Three, and A were received into evidence.

ISSUES:

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

Whether the claimant's February 2015 separation from the employment has previously been adjudicated and whether such prior adjudication continued in effect.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lori Starr was employed by TSC Industries, Inc. as a team member (retail clerk) from 2012 until February 7, 2015 when the employer discharged her from the employment. In January 2015 an employee had made an anonymous complaint to the employer's corporate human resources office alleging that male employee of the employer's Council Bluffs store, Miguel, had sexually harassed a female employee of that same store, Macey. The employer investigated the matter and concluded there was no basis for the allegation. The employer did not interview Ms. Starr as part of its investigation of the anonymous report of alleged harassment.

In December 2014, Macy and another female employee had spoken to Ms. Starr regarding alleged harassment perpetrated by Miguel. Miguel at that time resided with the mother of one of Ms. Starr's friends. Ms. Starr spoke to her friend regarding what she had heard regarding Miguel. Miguel living arrangement subsequently terminated.

After the employer had concluded its investigation of the harassment allegation, the employer became aware of Ms. Starr's alleged involvement in Miguel's living arrangement coming to an end. The employer erroneously concluded that Ms. Starr had retaliated against Miguel, after the employer had concluded its investigation, to get Miguel evicted. The employer concluded that Ms. Starr had continued to push the harassment issue in her discussions with coworkers after the employer had concluded its investigation. The employer concluded that Ms. Starr had thereby violated the employer's productivity policy.

The claimant asserts that the March 4, 2015, reference 05, decision concerning her separation from the employment constituted an attempt to re-adjudicated issues that had already been adjudicated by Workforce Development. However, the prior decisions that the claimant points to concerned whether the claimant was able to work and available for work while she was still employed and did not address whether she separated from the employment for a reason that would disqualify her for unemployment insurance benefits.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

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 employer failed to present sufficient evidence, and sufficiently direct and satisfactory evidence to establish, misconduct in connection with the employment. The employer elected not to present testimony from any personnel directly involved in the alleged misconduct. The employer had the ability to present testimony through the team members involved in the alleged misconduct, the store manager, and/or the human resources staff who investigated the matter. The evidence indicates that the claimant's concerns about Miguel predated the employer's investigation of alleged harassment and that the claimant's sharing of information with her friend had not connection to the employer's investigation. The employer had failed to present sufficient evidence to rebut the claimant's assertion that she was not interviewed in connection with the employer's investigation of the alleged harassment and had not been admonished to keep information confidential. The employer presented insufficient evidence to establish that the claimant retaliated against Miguel in connection with matters connected to the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

Unless appealed in a timely manner and reversed on appeal, a finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of Iowa Workforce Development, administrative law judge, or the employment appeal board, is binding upon the parties in proceedings brought under this chapter. See Iowa Code Section 96.6(3) and (4).

The claimant is mistaken when she asserts there has been a prior adjudication that bars adjudication of the issues related to her separation from the employment. The prior decisions in question addressed whether the claimant was available for work while she was still employed. The decision on that issue did not address whether she separated from the employment for

reason that would disqualify her for unemployment insurance benefits or that would relieve the employer of liability for benefits. Indeed, the decision regarding her availability during the employment would not bar adjudication of whether she was available for work during any period subsequent to the entry date of the decision in question, since adjudication of availability issues involves a week-by-week determination.

DECISION:

The March 4, 2015, reference 05, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged. There is no prior adjudication that barred adjudication of the separation in connection with the March 4, 2015, reference 05, decision or the subsequent appeal.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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