

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PATRICIA G HEAVERLO
Claimant

APPEAL NO. 07A-UI-07475-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**LIFE INVESTORS INSURANCE COMPANY
OF AMERICA**
Employer

**OC: 07/01/07 R: 03
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

Life Investors Insurance Company of America appealed from an unemployment insurance decision dated July 24, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 20, 2007. Claimant Patricia Heaverlo participated. Jill Lewis, Human Resources Specialist represented the employer and presented additional testimony through Assistant Manager Rod Comried. The administrative law judge took official notice of the Agency's record of benefits disbursed the claimant.

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: Patricia Heaverlo was employed by Life Investors Insurance Company of America from August 18, 1997 until June 18, 2007, when Assistant Manager Rod Comried discharged her for violating the employer's telephone usage policy. Ms. Heaverlo's hours of employment were 8:00 a.m. to 4:30 p.m. Ms. Heaverlo's duties involved frequent interaction with independent insurance brokers and much of this contact occurred by telephone. The final incident that prompted the discharge occurred on June 13, 2007. On that date, Ms. Heaverlo commenced a call with a broker friend at 4:26 p.m., four minutes prior to the scheduled end of her work day. Ms. Heaverlo continued on the call with the broker friend for 13 minutes. Though the call continued after the scheduled end of her shift, Ms. Heaverlo did not report the additional time as time for which she should be paid. Assistant Manager Rod Comried reviewed the telephone call and determined that the telephone call was personal in nature and that no business was transacted during the call. During the telephone call, the broker friend updated Ms. Heaverlo on his wife's pregnancy and asked Ms. Heaverlo how she was doing. Ms. Heaverlo spent part of the telephone call explaining to the broker friend that she could not fully update him on her personal life because she had been reprimanded for using the employer's telephone system for personal telephone calls. The employer deemed Ms. Heaverlo's general reference to the

reprimand to be a breach of confidentiality. This telephone call followed a call on June 8, where Ms. Heaverlo had spent 40 minutes speaking with her mother. Ms. Heaverlo's grandfather was in the hospital at the time.

The employer had reprimanded Ms. Heaverlo on May 17, 2007, for having excessive personal phone calls. The reprimand was based in part on calls Ms. Heaverlo received from her husband. The reprimand was also based on the fact that some of Ms. Heaverlo's business telephone calls with her broker friend contained some non-work-related discussion. At the time the employer issued the reprimand to Ms. Heaverlo, the employer acknowledged that some personal phone usage was to be expected. This was despite the employer's formal communications policy that prohibited use of the employer's telephone system for personal phone calls. After Ms. Heaverlo received the May 17 reprimand, the calls with her husband diminished. After Ms. Heaverlo received the May 17 reprimand, the only two calls that caused the employer concern were those noted above.

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 evidence in the record establishes that on June 13, Ms. Heaverlo participated in a personal phone call with a friend with whom Ms. Heaverlo also had an established business relationship. The evidence indicates that the call occurred at the very end of the business day on a Friday afternoon and that only four minutes of the call occurred while Ms. Heaverlo was on the clock. The greater weight of the evidence fails to establish that Ms. Heaverlo acted in willful or wanton disregard of the interests of the employer or intentionally violated reasonable standards of conduct in connection with the call. The evidence does not support the employer's assertion that Ms. Heaverlo breached any confidential matter during the discussion. The administrative law judge concludes that the evidence fails to establish a "current act" of misconduct upon which a disqualification for benefits must be based. See 871 IAC 24.32(8). Accordingly, the administrative law judge concludes that Ms. Heaverlo was discharged for no disqualifying reason. Ms. Heaverlo is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Heaverlo.

DECISION:

The Agency representative's July 24, 2007, reference 01, decision is affirmed. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs

