

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

SHELLEY L KELLER
105 NORTHWOOD DR
HIAWATHA IA 52233

NORDSTROM INC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-283

Appeal Number: 05A-UI-01562-JTT
OC: 01/09/05 R: 03
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Nordstrom filed a timely appeal from the February 3, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 1, 2005. Shelley Keller participated in the hearing. Peg Heenen of TALX UC Express represented Nordstrom and presented testimony through Doug Davidson, Team Leader; Jeelita Gallman, Senior Team Leader; and Robin Pospisil. Exhibit One was received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Shelley Keller was employed as a full-time customer service representative in Nordstrom's call center from April 1, 2004 until January 11, 2005, when Jeelita Gallman discharged her for misconduct based on unprofessional conduct in violation of company policy.

The last incident that prompted Ms. Gallman to discharge Ms. Keller took place on January 10, 2005. On that date, one or more of Ms. Keller's co-workers complained to a "mentor" that Ms. Keller had engaged in an inappropriate conversation while she was working in the call center. Ms. Keller had been discussing with a co-worker that co-worker's concern about her son's behavior, specifically spitting. Ms. Keller, in an apparent effort to make the co-worker feel better, mentioned to the co-worker that when her son was a toddler in diapers he would smear the contents of his diaper on the wall. One or more of Ms. Keller's co-workers was offended by Ms. Keller's contribution to the conversation. A "mentor" approached Ms. Keller, advised her that the conversation was not appropriate and asked Ms. Keller to stop. Ms. Keller stated, "Okay, I'm sorry." After the "mentor" moved on, Ms. Keller stood up, looked toward a row of co-workers in an attempt to discern who had complained about her? One or more of Ms. Keller's co-workers apparently reported this behavior as well. The matter was brought to the attention of Team Leader Doug Davidson the same day. Mr. Davidson had been Ms. Keller's immediate supervisor for two weeks. Mr. Davidson discussed the incident with Senior Team Leader Jeelita Gallman and Ms. Gallman proceeded to discharge Ms. Keller the next day.

Ms. Keller had previously been counseled and/or reprimanded for engaging in "unprofessional conduct." On June 1, 2004, Ms. Keller participated in an "Opportunity Check" meeting that was based on "numerous reports of unprofessional behavior and lack of good judgment." On November 26, Ms. Keller received a "Written First & Final Opportunity Check" for "Unprofessional behavior & Lack of good judgment." The reprimand warned that any further complaint would result in termination of Ms. Keller's employment. The reprimand was based on two incidents involving the same co-worker. On October 31, 2004, Ms. Keller had remarked to a co-worker, "They let anyone be a mentor around here now, don't they." On November 20, 2004, Ms. Keller called the telephone number for the "manager in charge" and made contact with the same co-worker. Ms. Keller asked the co-worker if there was anyone else around, indicating that she would prefer to speak with someone other than the co-worker about her issue.

The Nordstrom management team considered these incidents and others to be in violation of the employer's code of business conduct and ethics that would have been shared with Ms. Keller as part of the "new hire kit" at the time she was hired. Under this code, employees were expected to "act fairly and honestly with each other," were granted the "freedom to use good judgment," and were expected to "respect self and company." The policy was no more specific.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Keller was discharged for misconduct in connection with her employment. It does not.

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, (8) provide:

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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Since the claimant was discharged, 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). Before the administrative law judge can find that an employee was discharged for misconduct, the evidence in the record must establish the existence of a "current act" of misconduct. See 871 IAC 24.32(8).

In reaching a decision in this matter, the administrative law judge is guided by the public policy statement and legislative intent set forth at Iowa Code section 96.2. Courts are to construe provisions of unemployment compensation law liberally, and interpret the disqualification provisions strictly, to carry out the law's humane and beneficial purpose. Bridgestone/Firestone, Inc. v. Employment Appeal Bd., 570 N.W.2d 85 (Iowa 1997)

The evidence in the record fails to establish a "current act" of misconduct on the part of Ms. Keller. See 871 IAC 24.32(8). A select few may have found the subject matter of Ms. Keller's conversation offensive. However, many reasonable people, especially those with children, would not have found Ms. Keller's contribution to the conversation particularly offensive, despite the subject matter. There is no evidence in the record to suggest that Ms. Keller intended to broadcast the conversation or offend her co-workers. Instead,

Ms. Keller's comment about her son was made in the context of a "private" conversation with a co-worker who had confided in Ms. Keller about her child's problem behavior. Ms. Keller's brief attempt to discern the person who had eavesdropped on her conversation and then made a complaint based on the conversation was a natural response and reasonable under the circumstances. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Keller's conduct in connection with the incident that prompted her termination constituted no more than a good faith error in judgment or discretion, and did not constitute misconduct. See 871 IAC 24.32(1)(a). The record, therefore, fails to establish a "current act" of misconduct. See 871 IAC 24.32(8). Ms. Keller was discharged for no disqualifying reason and is, therefore, eligible for benefits, provided she meets all other eligibility requirements.

DECISION:

The Agency representative's decision dated February 3, 2005, reference 01, is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

jt/tjc