

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SUSAN J SAMEC

Claimant

APPEAL NO. 13A-UI-08653-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

YELLOWBOOK INC

Employer

OC: 06/23/13

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Susan Samec filed a timely appeal from the July 17, 2013, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on August 28, 2013. Ms. Samec participated. Christy Dalecky represented the employer and presented additional testimony through Justin Linnell.

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: Susan Samec was employed by Yellowbook, Inc., as a full-time Client Services Consultant from 2011 until June 27, 2013, when Justin Linnell, Marketing Manager for Telephone Sales, and Christine Dalecky, Senior Employee Relations and Legal Response Manager, discharged her from the employment in connection with a June 26, 2013, post Ms. Samec had made to her Facebook page. Ms. Samec had made the post at a time when she was off-duty and away from work. Ms. Samec had written, "To the Heather at work, don't fucking talk to me every again. Fuck off. Kindly. God bless." A coworker, Brielle Gerst had then engaged Ms. Samec in conversation via Facebook. Ms. Samec further wrote, "Yep. Gonna beat that ass. HATE smart ass fucks that start shit. Wrong girl." Ms. Gerst then asked, "Like Heather on your team..." Ms. Samec replied, "I'll never tell who. You will know tomorrow. We can talk. Fucking me over is seriously stupid. I guess she will find out. Dumb ass bitch." Ms. Gerst then offered to be a sounding board. Ms. Samec closed with, "Ok hun. I'm pretty upset right. Just hate stupid people."

Ms. Gerst or some other coworker who was a Facebook "friend" of Ms. Samec printed the correspondence and gave it to coworker Heather Wilming, the person to whom the Facebook friend thought the correspondence was directed. Ms. Wilming brought the correspondence to the attention of Mr. Linnell. Upon further investigation, Mr. Linnell learned that the post was about a different coworker, Heather Strauch, Associate Sales Manager.

On June 27, 2013, Mr. Linnell met with Ms. Samec to discuss the Facebook post. Ms. Samec said she did not want to talk about it. Ms. Samec told Mr. Linnell she had deleted the post, that the issue had been addressed, and that there was nothing to worry about. When Mr. Linnell pointed out that the matter appeared serious, Ms. Samec said someone at work had told Ms. Samec about comments Ms. Strauch had allegedly made about Ms. Samec's former boyfriend. Ms. Samec admitted making the Facebook posting, but asserted it was private correspondence. Mr. Linnell pointed out that others could view the posting and forward it. Mr. Linnell suspended Ms. Samec, conferred with Ms. Dalecky. The employer moved forward with discharging Ms. Samec the next day.

The employer concluded that Ms. Samec's Facebook post was in violation of two employer policies. The first policy was the employer's Code of Conduct policy, which prohibited threats of harm, harassment or bullying directed at other staff members. The second policy was the employer's social media policy, which prohibited the posting of defamatory comments about other staff via Facebook and other social media regardless of whether the employee making the post was acting on behalf of Yellowbook. The social media policy also indicated that an employee posting to social media sites must comply with all company policies. Ms. Samec was aware of the both the Code of Conduct policy and the social media policy and had received training in both. In addition, Ms. Samec had been counseled by a supervisor in July 2012 in connection with another Facebook posting, when she had written that she hoped management would get their act together and pay employees. Ms. Samec had made the July 2012 post from work.

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) alone. 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).

Threats of violence in the workplace constitute misconduct that disqualifies a claimant for benefits. The employer need not wait until the employee acts upon the threat. See Henecke v. Iowa Dept. Of Job Services, 533 N.W.2d 573 (Iowa App. 1995).

Violation of a specific work rule, even off-duty, can constitute misconduct sufficient to disqualify a claimant from unemployment insurance benefits. See Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992). But the employer must have a work rule that covers the off-duty conduct.

The evidence in the record establishes misconduct in connection with the employment. Ms. Samec severely undermined her credibility during the hearing with her implausible assertion that she did not recall making the Facebook posting that got her fired and her absurd suggestion that someone else hacked her Facebook account and made the post. Ms. Samec had acknowledged to Mr. Linnell on June 27, 2013 that she had indeed made the Facebook posting the previous day. The weight of the evidence indicates that Ms. Samec intentionally attempted to mislead the administrative law judge at the time of the hearing. The conduct that triggered the discharge involved a threat to a coworker at Yellowbook. The threat was in violation of Yellowbook's social media policy, which indicated on its face that it applied both within the context of the workplace and outside that context, and in violation of the employer's Code of Conduct policy. Ms. Samec knew the social media policy applied regardless of whether she was at work. A portion of the threat was uttered in correspondence with another coworker about workplace matters. That coworker or some other had no difficulty seeing the connection between the off-duty conduct and the workplace and had no difficulty seeing the threat for what it was, a threat to harm a fellow coworker.

Ms. Samec was discharged for misconduct in connection with the employment and 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.

DECISION:

The agency representative's July 17, 2013, reference 02, decision is affirmed. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs