**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**CLARA V PENA**
Claimant

**APPEAL NO. 10A-EUCU-01220-JTT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**POLARIS INDUSTRIES INC**
Employer

**OC: 12/7/08**
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the December 16, 2010, reference 06, decision that denied benefits. After due notice was issued, a hearing was held on February 23, 2011. The claimant participated. Melissa MacTegaard represented the employer. Exhibits One, Two, and Three were received into evidence.

**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: Clara Pena was employed by Polaris Industries, Inc., as a full-time second-shift assembler from October 1, 2010 until November 20, 2010, when Melissa MacTegaard and Eric Bigelow, production supervisor, discharged her from the employment. The discharge was based on offensive, profane, and threatening comments two other employees attributed to Ms. Pena. On November 18, employee Charlene Wench alleged to Group Lead Sandy Hill that a week or two earlier Ms. Pena had said that Ms. Wench had "picked the wrong bitch to fuck with" and that "paybacks are hell." Ms. Hill forwarded Ms. Wench's complaint to Ms. MacTegaard. Ms. MacTegaard and Mr. Bigelow spoke to Ms. Hill, Ms. Wench, another employee, Jody Jones, and Ms. Pena. Ms. Pena denied making the statement(s) attributed to her. The employer did not ask Ms. Pena whether she had used profanity. Ms. Wench and Ms. Jones alleged that Ms. Pena had uttered offensive remarks, did not provide specific dates of incidents, but further alleged that Ms. Pena fostered a hostile work environment. Ms. Wench, Ms. Jones, and Ms. Hill are all still with the employer. The employer's work rules prohibit profanity and threats directed at coworkers. Based on the allegations made by Ms. Wench and Ms. Jones, the employer discharged Ms. Pena from the employment. Ms. Pena had received no prior reprimands.

**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 employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish misconduct in connection with the employment. The employer had the ability to present testimony from Ms. Wench, Ms. Jones, and/or Ms. Hill, but elected not to present such testimony. In other words, the employer presented no testimony from anyone with personal knowledge of the actual events that triggered the discharge. The weight of the evidence establishes that the employer discharged Ms. Pena based on mere allegations of conduct supposedly to have occurred a week or two before the matter was brought to the employer's attention. That factor by itself calls into question the credibility and reliability of the complaint. The employer might have been able to sufficiently address that issue by providing testimony from persons with firsthand knowledge, but the employer elected to use a different approach. The weight of the evidence fails to establish that Ms. Pena made the threatening, offensive, profane remarks attributed to her. The evidence fails to establish that Ms. Pena did anything to threaten or intimidate coworkers or that she did anything to create a hostile work environment. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Pena was discharged for no disqualifying reason. Accordingly, Ms. Pena is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Pena.

**DECISION:**

The Agency representative's December 16, 2010, reference 06, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw