

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TIERNEY ISRAEL
Claimant

APPEAL NO. 09A-UI-09352-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 05/17/09
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 17, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 16, 2009. Claimant Tierney Israel participated. Sara Dobbins, Store Manager, represented the employer. Exhibits One through Five 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.

Whether the discharge was based on a “current act.”

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tierney Israel worked for Casey's Marketing Company as a part-time clerk/cook during two separate periods. The first period of employment was from November 2006 to August 2007. The most recent period of employment was from June 2008 to April 29, 2009. Sara Dobbins, Store Manager, was Ms. Israel's immediate supervisor.

On or about Tuesday, April 21, 2009, an employee brought to Ms. Dobbins' attention, a video that Ms. Israel had just posted on the Internet website youtube.com. Ms. Israel had also posted a link to the youtube.com video on her facebook.com Internet webpage. Ms. Israel had made the video while she was at work at Casey's. The video showed the steps to making a pizza at Casey's. This was proprietary information belonging to Casey's. The video clearly indicated that it was made inside an actual Casey's store. The video featured another employee in an apron and cap with the Casey's logo. A portion of the video was captioned, “How to deal with a disgruntled employee.” During this portion of the video, Ms. Israel had filmed the Casey's employee waving a kitchen knife in a threatening gesture. Another portion of the video was captioned, “How to deal with a disgruntled customer.” During this portion of the video, Ms. Israel had filmed the same Casey's employee waving a kitchen knife in a threatening gesture at a girl in the doorway of the Casey's store. The girl was Ms. Israel's younger sister.

At the same time Ms. Dobbins became aware of the above video, she became aware of two other videos Ms. Israel had made at the Casey's store and had posted on youtube.com in the summer of 2007, immediately following the end of her first period of employment. One showed another Casey's employee making a pizza and singing. The other showed the same Casey's employee singing. These two videos were also filmed inside the Casey's store.

The credits for each of the videos indicated that they were filmed and edited by Ms. Israel.

On April 29, 2009, Ms. Dobbins discharged Ms. Israel from the employment for violating the employer's policy concerning personal websites and web logs (blogs). The employer had a written policy concerning employee Internet activity affecting the employer. The policy specifically included off-duty conduct. The policy prohibited the disclosure of confidential or proprietary information about Casey's. The policy required that employees make clear in the web post that the comments expressed were their own and not the company's. The policy indicated that violation of the policy could lead to corrective action up to and including termination of employment upon the first offense. The policy was contained in the handbook Ms. Israel had received at the time of her initial hire in November 2006. A copy of the handbook was made available to Ms. Israel at the Casey's store.

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).

Violation of a specific work rule, even off-duty, can constitute misconduct, provided the work rule includes off-duty conduct. In Kleidosty v. EAB, 482 N.W.2d 416, 418 (Iowa 1992).

The video Ms. Israel filmed, edited and posted in April 2009 was clearly contrary to the interests of Casey's Marketing Company. It shared proprietary information. It demonstrated open hostility toward, and a threat directed at, customers and staff. It showed at least two Casey's employees—the filmmaker and the filmed subject—engaged in horseplay in the kitchen of a Casey's store. Ms. Israel does much to minimize or excuse away conduct she most certainly knew was contrary to the interests of the employer at the time she engaged in it. The administrative law judge concludes that the evidence does show a willful disregard of the employer's interests.

According to the employer's testimony, the employer learned of the conduct on or about April 21, but did not speak to Ms. Israel about it until April 29, 2009. The administrative law judge concludes that the employer's eight-day delay in addressing the conduct with Ms. Israel was unreasonable. The administrative law judge further concludes that that because of the employer's unreasonable delay, the conduct no longer constituted a “current act” of misconduct at the time Ms. Dobbins addressed the conduct with Ms. Israel. See 871 IAC 24.32(8). Because the discharge was not based on a current act, the discharge cannot serve as a basis for disqualifying Ms. Israel for unemployment insurance benefits. See 871 IAC 24.32(8). Accordingly, Ms. Israel is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Israel.

DECISION:

The Agency representative's June 17, 2009, 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