IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LINDA M RUPE
Claimant

DES MOINES IND COMMUNITY SCH DIST
Employer

APPEAL NO: 08A-UI-03049-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/10/08 R: 02
Claimant: Respondent (1)

Section 96.5-2- a- Discharge

STATEMENT OF THE CASE:

Des Moines Independent Community School District (employer) appealed a representative's March 18, 2008 decision (reference 01) that concluded Linda M. Rupe (claimant) was qualified to receive benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, telephone hearings were held on April 10 and 14, 2008. The claimant participated in the hearings. Beth Nigut, the employer's legal counsel, represented the employer. Doug Willard Todd Liston, Cather McKay and Sheila Mason appeared on the employer's behalf. During the hearings, Joint Exhibit One and Employer's Exhibits One and Two were offered and admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on April 11, 1989. The claimant worked full time. Prior to her employment separation, the claimant was a transportation lead driver who was not assigned to any specific route. Liston supervised the claimant.

The claimant understood the employer did not allow employees to harass and make discriminatory remarks at work. Although the employer previously did not discharge an employee if they made a racially discriminatory comment, the employer had recently discharged an employee for making a racially discriminatory comment. The claimant knew the employer had recently discharged an employee for making a racially discriminatory comment.

On or about December 5, 2007, the claimant was on the bus with a relatively new employee, C.O. The claimant did not have any problems working with C.O. On December 19, C.O. made a written complaint that the claimant used the N word while talking about how the employer worked employees during the summer. C.O. reported that initially she thought she had not

heard correctly what the claimant said on December 5. On December 19, C.O. further reported that the next day, December 6, the claimant apologized to C.O. for saying the N word the day before. In C.O.'s report, she indicated that while she did not believe the claimant was being mean to her, the claimant's comment upset her. C.O. also indicated in her report that she had not reported the incident earlier because she was a new employee and knew the claimant was a long-time employee who was involved in the local union. (Employer Exhibit Two.)

The employer received C.O.'s complaint the day before the holiday break. When school resumed, the employer had C.O.'s written December 19, 2007 statement typed up and had her sign it. The employer's investigator talked to the claimant about the complaint in early January. The claimant submitted her written response to the complaint on January 9, 2008. The claimant reported that she did not remember if she had been in a bus with C.O. on December 5 and did not remember any conversation about summer assignments or work with C.O. (Joint Exhibit One.) The claimant continued working while the employer investigated the complaint.

The employer's investigator talked to several people about this complaint. No one else was present when the alleged conversation between C.O. and the claimant took place. The investigator talked to employees C.O. had talked to before she filed her complaint and with employees who the claimant gave as character references. (Joint Exhibit One.) On February 5, 2008, the employer's investigator concluded the claimant made a racial comment to C.O. on December 5 and 6, 2007. This conclusion was forwarded to Willard. On February 12, 2008, the employer discharged the claimant for violating the employer's harassment and discrimination policy by saying the "N" word to C.O. on December 5 and 6, 2007.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

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. 871 IAC 24.32(8).

The employer established business reasons for discharging the claimant. If the claimant made the comment, she violated the employer policy. However, this is a she said, he said situation. As a result credibility of the witnesses is the primary issue that must be resolved.

When the employer investigated the complaint, the employer's investigator had the advantage of talking to C.O. and other employees who did not participate in the hearings on April 10 and 14. The employer also had to deal with a credibility issue, but had the advantage of personally talking to people. Since the claimant's testimony during the April 10 and 14 hearings was credible, her testimony must be given more weight than the employer's reliance on hearsay information from employees who did not testify at the April hearings. A preponderance of the evidence does not establish that the claimant made the derogatory comment C.O. complained

about. This administrative law judge finds it highly improbable that the claimant, as the local union president, said the N word to C.O. who is an African American especially after an employee had recently been discharged for this same offense. A preponderance of the evidence does not establish that the claimant said the N work. Therefore, she did not commit work-connected misconduct.

Assume for a moment, the claimant said the N word on December 5 and 6, 2007. The employer knew about the violation on December 19. Even giving the employer until school resumed on January 2 or 3, 2008, the employer waited over a month to discharge the claimant. For unemployment insurance purposes, before a claimant can be disqualified from receiving benefits, the discharge must be based on a current act of work-connected misconduct. The employer did not establish a current act of work-connected misconduct.

The employer presented the results of the claimant's grievance and why the employer did not reverse the claimant's discharge. (Employer Exhibit One.) Even though the claimant brought up new information after she had been discharged, her explanation as to why she had not thought about certain incidents in early January is credible. Information contained in Employer Exhibit One does not persuade the administrative law judge that the claimant was not a credible witness.

Based on the evidence presented during the April 10 and 14 hearings, the facts do not establish that the claimant committed a current act of work-connected misconduct. As of February 10, 2008, the claimant is qualified to receive benefits.

DECISION:

The representative's March 18, 2008 decision (reference 01) is affirmed. The employer discharged the claimant for business reasons that do not constitute work-connected misconduct. As of February 10, 2008, the claimant is qualified to receive benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefit paid to the claimant.

_____
Debra L. Wise
Administrative Law Judge

_____
Decision Dated and Mailed

dlw/css