

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**TAMMIE L POKORNY**  
Claimant

**NORDSTROM INC**  
Employer

**APPEAL 15A-UI-07176-SC-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/31/15**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed an appeal from the June 15, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon the determination it did not furnish enough evidence to show the claimant was discharged for disqualifying job-related misconduct. The parties were properly notified about the hearing. A telephone hearing was held on July 22, 2015. Claimant Tammie Pokorny participated on her own behalf. Kathy Benton also participated on the claimant's behalf. Employer Nordstrom Inc. participated through Human Resources Assistant Jill McDowell, Packing Manager Ron Westbrook and Assistant Packing Manager Beth Anderson. Thomas Kuiper of Talx represented the employer. Employer's Exhibits 1 and 2 were received and admitted into the record with no objection. Claimant's Exhibit A was received and admitted into the record over the employer's objection that the exhibit is comprised of hearsay.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a packing processor beginning October 3, 2011, and was separated from employment on June 2, 2015, when she was terminated. She reported to Assistant Packing Manager Beth Anderson and Packing Manager Ron Westbrook.

On May 26, 2015, the claimant stepped over a ground level conveyor belt instead of utilizing the stairs positioned over the conveyor belt which the employer considers to be a safety violation. However, other employees, such as maintenance, are given more leeway regarding stepping over the conveyor belt. She was not at work the following two days.

When the claimant returned to work, she said good morning to her co-worker Veronica who confronted the claimant and asked her what she said. When the co-worker asked what she said, the claimant reiterated her earlier greeting. Veronica then called the claimant "the biggest fucking snitch here." Veronica reported to Anderson that the claimant had called her a snitch and sworn at her. Anderson then reported the conversation to Westbrook.

Westbrook and Anderson looked at the claimant's past disciplines. The claimant was given "Notification" on December 12, 2011 for throwing reflectors at a co-worker. On November 1, 2013, she was given a final warning for unprofessional behavior with multiple co-workers. After reviewing the claimant's disciplinary history, the employer decided to terminate the claimant's employment for the safety violation and creating a hostile work environment.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to or impose discipline up to or including discharge for the incident under its policy.

The employer has identified two incidents that occurred in quick succession that led to the claimant's termination: the safety violation and the conversation with Veronica. The claimant acknowledged she stepped over the conveyor belt. However, she did not know it was a safety violation as she had witnessed other employees, including management, step over the conveyor belt rather than use the stairs. The employer did not provide any documentation that stepping over the conveyor belt was a safety violation. The employer acknowledged that other employees are allowed to step over the conveyor belt as part of their job duties. As other employees are allowed engage in this same behavior, the employer's contention that this is a serious safety violation is not persuasive. Additionally, the claimant's safety violation which, in part, led to her termination, was an isolated incident and inasmuch as employer had not previously warned claimant about this safety violation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

The other reason for the claimant's termination was due to the conversation she had with Veronica when she returned to work. The employer relied on hearsay testimony with regard to the incidents that occurred between the claimant and Veronica. When the record is composed of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Mindful of the ruling in *Crosser, id.*, and noting that

the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. As the claimant's version in which she denied she did not call her co-worker a snitch or use inappropriate language toward her is more credible, the employer has not furnished enough evidence to show the claimant engaged in disqualifying job-related misconduct.

**DECISION:**

The June 15, 2015, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Stephanie R. Callahan  
Administrative Law Judge

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Decision Dated and Mailed

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