

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

NICOLE R ENFIELD
Claimant

VON MAUR INC
Employer

APPEAL 14A-UI-11277-LT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/21/14
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the October 21, 2014 (reference 01) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on November 19, 2014. Claimant participated. Employer participated through store manager Martha Deyoung-Mulder. Employer's Exhibits One through Three were received.

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: Claimant was employed full time as a loss prevention associate and was separated from employment on September 19, 2014. Sales associate Brittany Bumgartner reported that claimant told her that associate Jared said that claimant and Bumgartner looked alike and he wanted to have a "trifecta." Two weeks before the separation, claimant recalled having told Jared his observation that she and Bumgartner look alike was ironic since Bumgartner has a twin. It was then that Jared used the term "trifecta." Claimant later told Bumgartner that Jared and Brian both said they look alike. Acquaintances had told them once before that they look alike because they both have dark hair and glasses, but they agreed they do not look much alike. Bumgartner laughed and did not appear to be concerned about the information claimant had just provided.

The participants in the hearing did not know Jared's intended meaning of the word "trifecta." The employer is not certain when the incident occurred or when it was reported. The employer first notified claimant about the issue on September 19, the date of discharge, and questioned her about the comment. Claimant was discharged because of having told Bumgartner what Jared said instead of reporting the issue to the store manager or loss prevention department manager. The employer considered this a breach of confidentiality and lost trust in her, believing she should have kept the comment in the loss prevention office and should not have repeated it to Bumgartner. Jared was discharged because of the situation. Bumgartner did not participate in the hearing.

A prior warning on February 7, 2014 was vague as to the details that led to the warning. Claimant recalled it was because she had asked an associate why another associate had quit after having heard about the separation through word-of-mouth and email.

REASONING AND CONCLUSIONS OF LAW:

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

When the record is composed solely 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.

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), (8), (9) 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.

(8) Past acts of misconduct. 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.

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

Since the final incident took place two weeks prior to the separation, even assuming the employer acted immediately to begin the investigation although they did not confront claimant until the separation date, the incident is considered current.

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 assess points or impose discipline up to or including discharge for the incident under its policy. The conduct for which claimant was discharged was merely an isolated incident of poor judgment. Claimant did not know Jared's intention or interpretation of the word and simply discussed a prior non-work-related topic with Bumgartner about people making comments they look alike. Training or general notice to staff about a policy is not considered a disciplinary warning. A warning for inquiring into another employee's separation is not similar to a non-work related social acquaintance small talk and the employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation

and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. Thus, there is not sufficient similarity to the incidents to meet the employer's burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

DECISION:

The October 21, 2014 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

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