IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

AMANDA N COLLINS
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 11A-UI-08077-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/17/11
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

Amanda Collins filed a timely appeal from the June 7, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 14, 2011. Ms. Collins participated. Mike Welch, Assistant Manager for Groceries and Consumables, represented the employer and provided additional testimony through Assistant Manager Jan Dowdy.

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: Amanda Collins was employed by Wal-Mart as a part-time baker from October 2010 until April 17, 2011, when Mike Welch, Assistant Manager for Groceries and Consumables, discharged her for directed vulgar and profanity laced language at her immediate supervisor in an off-duty Facebook message to the supervisor. The supervisor was Sherry Juilff, Baker Department Manager. Ms. Collins included in the message, among other offensive language and epithets, a reference to Ms. Juilff as a "two face lying fucking bitch." The conduct was in violation of the employer's social media policy, which applied to on-duty and off-duty conduct. The conduct was also in violation of the employer's harassment policy. Ms. Collins had been made aware of both policies prior to the conduct.

Though the correspondence between Ms. Collins and Ms. Juilff occurred on April 3, Ms. Juilff waited until April 15 to bring the matter to the attention of her supervisor, Mr. Welch. On April 17, Mr. Welch met with Ms. Collins. Ms. Collins admitted to sending the message.

When Mr. Welch had prepared the work schedule for the period after April 17, he had neglected to put Ms. Collins on it. This was oversight on the part of Mr. Welch and not indicative of an earlier decision to end Ms. Collins' employment.

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).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. Deever v. Hawkeye Window Cleaning, Inc. 447 N.W.2d 418 (Iowa Ct. App. 1989).

Violation of a specific work rule, even off-duty, can constitute misconduct sufficient to disqualify a claimant from unemployment insurance benefits. See Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992). But the employer must have a work rule that covers the off-duty conduct.

The evidence in the record establishes misconduct in connection with the employment. Ms. Collins' written attack on Ms. Collins via Facebook on April 3, 2011, what clearly designed to annoy, intimidate and alarm Ms. Juilff. That is the definition of harassment. In addition, the conduct was intended to challenge Ms. Juillf's authority as Ms. Collins' supervisor. Ms. Collins, for some misguided reason, assumed her vicious off-duty attack on Ms. Juilff was off limits to the employer and that she could engage in the conduct without consequence. The employer had a social media policy and harassment policy that indicated otherwise. In addition, the nature of the contact and the parties involved clearly indicate it was *in connection with the employment*.

The remaining question is whether the conduct from April 3, which came to the attention of Ms. Juilff on April 3, constituted a current act if the employer waited two weeks, until April 17, to take the matter up with Ms. Collins. The employer has offered no explanation regarding why Ms. Juilff sat on the matter for 12 days before she brought it to the attention to Mr. Welch. Absent evidence to establish good cause for that delay, the administrative law judge concludes that the discharge was not for a *current act* of misconduct and, therefore, cannot serve as the basis for disqualifying Ms. Collins for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Collins was discharged for no disqualifying reason. Accordingly, Ms. Collins is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Collins.

DECISION:

The Agency representative's June 7, 2011, reference 01, decision is reversed. The discharge was not based on a current act. 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

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