IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

FRANCISCO J MARTINEZ Claimant **WEST LIBERTY FOODS LLC** Employer	**APPEAL NO. 22A-UI-01353-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/28/21** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant, Francisco Martinez, filed a timely appeal from the December 13, 2021, reference 01, decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on November 30, 2021 for conduct not in the best interest of the employer. After due notice was issued, a hearing was held on February 7, 2022. Claimant participated. Mira Zamudio, Human Resource Supervisor, represented the employer.

The employer submitted proposed exhibits after the hearing record had closed. Those materials were not reviewed by the administrative law judge and were not received into evidence. The employer did not provide good cause for failing to submit the materials prior to the appeal hearing date or for failing to send the materials to the claimant prior to the appeal hearing date.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant, Francisco Martinez, was employed by West Liberty Foods, L.L.C. as a full-time Production Supervisor until November 30, 2021, when the employer discharged him from the employment for alleged sexual harassment of a female subordinate. The claimant began his employment in 2006 and was promoted to Production Supervisor in January 2020.

At the start of the employment, the employer provided the claimant with an employee handbook that included a policy prohibiting sexual harassment. The claimant did not review the handbook or the sexual harassment policy. Once the claimant became a Production Supervisor, his duties included assisting with reinforcing the employer's policies.

During the first week of November 2021, a female production worker spoke to the claimant regarding an opening for a Team Lead position. The informal conversation took place in an office with two other employees present. The conversation took place in Spanish. All parties present were Spanish speakers. The claimant is also fluent or nearly fluent in English. The claimant communicated in both English and Spanish in the workplace. The claimant viewed the brief informal conversation as an informal interview. After the claimant asked his questions regarding the claimant's qualifications for the Team Lead position, the claimant added, "You haven't given me anything under the table." The claimant asserts he was joking and further asserts that his utterance was in keeping with the female candidate's joking nature. The claimant asserts that the particular figure of speech, when uttered in Spanish, lacks a sexual connotation. Statements the female candidate and the other female employee later made to the employer included assertions that the claimant's utterance was perceived as a request for a sexual favor in exchange for consideration for the promotion to Team Lead. The claimant conferred with his supervisor regarding the candidates for the Team Lead position and the pair together selected a different candidate for the Team Lead position.

After the claimant completed his shift on November 8, 2021, the claimant commenced a period of approved vacation. The claimant traveled to Cancun, Mexico for a family vacation. The claimant was due to return to work on November 24, 2021.

On November 11, 2021, the female candidate submitted a written complaint to the employer's human resources personnel. The female candidate wrote that when the claimant made his comment, "You have not done anything underneath the table," the female candidate told the claimant she "does not play like that and, if that was how it was going to be, [she] did not want it." The female candidate added that the claimant laughed and then walked out of the office after the brief conversation. The female candidate characterized the claimant's laugh as "nervous."

On November 13, 2021, the employer conducted separate interviews of the two other employees, Ingrid Amayo and Mario (last name unknown), who had been present in the office at the time the claimant and the female candidate spoke about the Team Lead opening. Mario provided a written statement indicating the claimant told the female candidate she did not give the claimant anything and did not do anything for the claimant. Ms. Amayo stated that after the claimant asked his questions of the candidate regarding her qualifications, the claimant said the female candidate had not given him anything under the table.

In anticipation of the claimant's November 24, 2021 scheduled return to the employment, the employer contacted the claimant on November 22, 2021 and told him to remain off work pending the employer's investigation. This was the first time the employer had spoken to the claimant regarding the complaint the employer received on November 11, 2021. The employer had made a conscious decision not to contact the claimant during his family vacation to discuss the matter. During the contact on November 22, 2021, the claimant stated he had interviewed of the female candidate for the Team Lead position and that the interview had taken place in the office. In response to the employer's question regarding whether the claimant had made a sexual comment, the claimant replied that he had been with the employer for 15 to 16 years and would never make a sexual comment to anyone. The claimant stated that he did not recall telling the female candidate that she did not give him anything under the table, but the claimant added that the expression in Spanish usually refers to money and is not sexual.

On November 29, 2021, the employer interviewed another employee, Juan Rodriguez. One or both of the female employees interviewed by the employer had asserted the claimant spoke to Juan Rodriguez regarding his reasons for not promoting the claimant and that the claimant had

stated to Mr. Rodriguez that the claimant was “fucking up a lot” on a particular date and in connection with a particular task. When interviewed by the employer, Mr. Rodriguez denied any such conversation had taken place. The claimant had actually spoken to other employees regarding a disagreement between the claimant and the female candidate about whether particular materials could be mixed together. The group involved in that conversation had included a Juanita Rodriguez.

On November 30, 2021, the employer summoned the claimant to a meeting and conducted a second interview with the claimant. Though the claimant conceded he had uttered the comment, “You haven’t done anything for me under the table,” and conceded it was wrong to have uttered the comment, the claimant denied there was anything sexual about the comment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual’s wage credits:
>
> 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 disqualification shall continue 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).

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 Iowa Administrative Code rule 871-24.32(4).

The weight of the evidence in the record establishes a discharge for no disqualifying reason. The employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to meet its burden of proving a discharge for misconduct in connection with the employment. See Iowa Administrative Code rule 871-24.32(4). The employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to rebut the claimant's testimony regarding the context, substance, and tone of the brief conversation with the Team Lead candidate during the first week of November 2021. The employer elected not to present testimony from any of the three individuals present for the utterance in question, despite having the ability to present such evidence. The employer elected not to present testimony from the human resources personnel who interviewed the claimant on November 30, 2021, despite having the ability to do so. The claimant's demeanor during the hearing was noteworthy in that the claimant welcomed the evidence presented by the employer and did not come across as defensive, evasive or guarded.

The claimant made an error in judgment during the first week of November 2021 when he made an off-the-cuff comment that the Team Lead candidate had not given him anything "under the table." The employer presented insufficient evidence to rebut the claimant's assertion that the utterance was more than as a joke in conversation with a person known for her sense of humor. There was nothing sexual about the utterance. In conventional parlance, giving someone something "under the table" does not refer to sexual favors. If the claimant had intended the utterance as a quid pro quo proposition for sex, money or any other thing of value, a reasonable person would not expect such utterance to be made in the presence of two witnesses.

The claimant's isolated error in judgment did not arise from or demonstrate a willful and wanton disregard of the employer's interests and did not constitute misconduct in connection with the employment. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The December 13, 2021, reference 01, decision is reversed. The claimant was discharged on November 30, 2021 for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

James E. Timberland
Administrative Law Judge

February 25, 2022
Decision Dated and Mailed

jet/mh