IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KARILYN E MILLER-BAILEY
Claimant

HUDSON MALLANEY & SHINDLER PC
Employer

APPEAL NO. 10A-UI-05358-SW

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/07/10
Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated March 30, 2010, reference 01, that concluded she was discharged for work-connected misconduct. A hearing was held on July 9, 2010, in Des Moines, Iowa. The parties were properly notified about the hearing. The claimant participated in the hearing with her representative, Larry Ball, Jr., attorney at law. Roger Hudson, Sr., participated in the hearing on behalf of the employer with witnesses, R.J. Hudson, Cindy Vander Muelen, and Jenna Green. Exhibits One through Five were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked for the employer as an administrative assistant and paralegal from November 27, 2008, to March 5, 2010. The claimant worked as assistant to attorney, R.J. Hudson.

On February 12, 2010, the claimant met with a client, Cindy Vander Muelen, regarding a child custody and child support proceeding that Hudson was representing her on. Hudson had told Vander Muelen that he was going to request a continuance of the hearing, so Vander Muelen asked the claimant about the continuance. The claimant responded that they had missed filing for the continuance. She went on to tell Vander Muelen that it was not her fault that the continuance had been missed, it was Hudson's fault. She told Vander Muelen that Hudson had been out of the office a lot due to family problems and had been yelling at her. The claimant said, "R.J. is not as good of an attorney as he thinks he is."

Vander Muelen considered the comments the claimant made to her to be unprofessional and approximately a week later, she reported the comments to another attorney in the office, Steve Shindler. At some point afterward, Shindler informed Hudson about the comments the claimant had made to Vander Muelen.

Around the time Shindler told Hudson about the comments the claimant had made to Shindler, Hudson and his wife came into the office on the weekends of February 20-21 and February 27-28 to try to get work organized and caught up. Hudson discovered the claimant's work area was in

disarray and documents that had not been filed. On February 27, Hudson asked her to clean up her area and get her files in order. The claimant became angry and threatened to quit.

During the week of March 1, a law clerk in the office informed Hudson that the claimant said she was looking for another job and planned to quit her job at the end of the month.

On March 5, the employer discharged the claimant for making derogatory comments about Hudson, not keeping up on her work, and her imminent plans to quit her job. Hudson never explained this as the reason for the discharge, but instead attributed it to their personalities being too similar.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

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 substantial and 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).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing the credibility of the witnesses and the reliability of the evidence and by applying the proper standard and burden of proof.

Much of the employer's evidence dealt with the conduct by the claimant that could have provided grounds for her discharge, but were not the grounds for her discharge because the information was never communicated to the employer until after the discharge. Other evidence about the claimant being disorganized and messy amounts to proof of unsatisfactory conduct not rising to the level of willful and substantial misconduct. The fact that the claimant was looking for another job or had secured another job and was about to give notice cannot be misconduct at all. The crux of this case is whether the claimant made the comments to Vander Muelen.

Vander Muelen had absolutely no reason to be untruthful regarding what the claimant said to her. Vander Muelen testified credibly and consistently. Her testimony outweighs the claimant's denial, as the claimant clearly had a motive to deny making the comments.

The claimant's comments to Vander Muelen amount to a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Misconduct has been shown, but the final issue is whether this can be considered a current act of misconduct.

871 IAC 24.32(8) provides:

> (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.

Viewed simplistically, one could conclude that any act occurring more than two weeks before a discharge cannot be a current act. Using this analysis, a dishonest employee who successfully conceals an act from management would not be subject to disqualification if management later discovers the dishonesty several months later. The only logical interpretation of the rule is that it prevents an employer from using past acts of misconduct of which the employer was aware as the grounds for a discharge some time later.

This view is supported by the Iowa Court of Appeals' interpretation of this rule in *Greene v. Employment Appeal Board*, 426 N.W.2d 659 (Iowa App. 1988). In *Greene*, the court ruled that to determine whether conduct prompting the discharge constitutes a disqualifying current act, the decision maker must consider the date on which the conduct came to the employer's attention and the date on which the employer notified the employee that the conduct provided grounds for dismissal. Any delay in taking action must have a reasonable basis. The court decided that the three-day delay between final act and notice of possible dismissal was not unreasonable. *Id*. at 662.

The conversation between the claimant and Vander Muelen took place on February 12. Vander Muelen said she had reported the comments to Steve Shindler about a week later, which would around February 19. R.J. Hudson could not pinpoint when he learned of the comments, but it would have been most likely between February 20 and February 27. In light of Hudson's pressing need to review and organize the files in the office, I conclude the delay in discharging the claimant until March 6, 2009, was reasonable under the circumstances and was not for a non-current act.

DECISION:

The unemployment insurance decision dated March 30, 2010, reference 01, is affirmed. The claimant is disqualified from receiving unemployment insurance benefits until she has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Steven A. Wise
Administrative Law Judge

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Decision Dated and Mailed

saw/kjw