

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEREMY T SIRENO
Claimant

APPEAL NO. 09A-UI-03319-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CINGULAR WIRELESS LLC
Employer

OC: 02/01/09
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 20, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 25, 2009. Claimant Jeremy Sireno did not participate. The claimant provided a telephone number for the hearing, but was not available at that number at the scheduled start of the hearing. Bill Stasek of TALX UC eXpress represented the employer and presented testimony through Adam Malmberg, Store Manager. Exhibits One through Eight were received into evidence.

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: Jeremy Sireno was employed by Cingular Wireless as a full-time retail sales consultant from October 2006 until February 8, 2009, when Store Manager Adam Malmberg and Area Retail Sales Manager Jana Anderson discharged him. Mr. Malmberg was Mr. Sireno's immediate supervisor.

The final incident that prompted the discharge occurred on January 21, 2009. On that day, Mr. Sireno became upset when Mr. Malmberg told him that a customer had complained about Mr. Sireno's service to the customer. The customer had complained that Mr. Sireno had taken a personal phone call and was text messaging while he served the customer. Mr. Sireno asserted to Mr. Malmberg that he had been text messaging another store. Mr. Malmberg advised Mr. Sireno that what was most important was the customer's perception. Mr. Sireno became upset. Mr. Sireno said, "This is bullshit. You always believe the customer over me." Mr. Sireno then removed the "simm" memory card from his cell phone and indicated that he was leaving. Mr. Malmberg told Mr. Sireno that his unauthorized departure would be a serious matter and not merely an unauthorized day off. Mr. Sireno departed nonetheless. Mr. Malmberg notified Area Retail Manager Jana Anderson of Mr. Sireno's conduct. On January 22, Ms. Anderson suspended Mr. Sireno pending a decision about his employment.

The employer had reprimanded Mr. Sireno in October 2008 for violating the employer's code of business conduct by using an employer issued cell phone to play a racially offensive video. The employer deemed Mr. Sireno's use of profanity and unauthorized departure on January 21, 2009 as further violations of the code of business conduct.

After the January 21 incident and the January 22 suspension, Mr. Malmberg and Ms. Anderson recommended to their superiors that Mr. Sireno be discharged from the employment. The employer discharged Mr. Sireno from the employment on February 3, 2009.

Mr. Sireno established a claim for unemployment insurance benefits that was deemed effective February 1, 2009.

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).

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).

The weight of the evidence indicates that Mr. Sireno's application for unemployment insurance benefits was based on the February 3, 2009 discharge, not the earlier suspension.

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The weight of the evidence indicates that Mr. Sireno engaged in subordinate conduct on January 21, 2009 when he unreasonably failed to heed Mr. Malmberg's reasonable directive that he stay and work his assigned shift. However, the evidence indicates no prior instances wherein Mr. Sireno failed to follow the employer's directive. The isolated instance of insubordinate behavior would not constitute misconduct in connection with the employment that would disqualify Mr. Sireno for unemployment insurance benefits.

Mr. Sireno's early departure on January 21, 2009 was an unexcused absence. However, the evidence fails to establish any additional unexcused absences. A single unexcused absence does not constitute misconduct in connection with the employment and would not disqualify Mr. Sireno for unemployment insurance benefits. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989).

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).

The weight of the evidence indicates that Mr. Sireno's profane utterance and associated tantrum were directed at Mr. Malmberg as a direct challenge to Mr. Malmberg's authority to direct Mr. Sireno's work and to appropriately respond to customer feedback. This conduct did in fact constitute misconduct in connection with the employment.

The remaining issue is whether Mr. Sireno was discharged for a "current act" of misconduct. 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).

The weight of the evidence indicates that Mr. Malmberg’s comments to Mr. Sireno on January 21, 2009 placed Mr. Sireno on warning that his employment was in jeopardy. Mr. Malmberg did not come right out and say that Mr. Sireno could be discharged from the employment. Instead, Mr. Malmberg told Mr. Sireno that his conduct and unauthorized departure were a serious matter and more than a mere unauthorized day off from work. The employer followed up the next day with a disciplinary suspension pending a decision about Mr. Sireno’s continued employment. The weight of the evidence indicates that a reasonable person in Mr. Sireno’s position would have understood no later than January 22, 2009 that his January 21, 2009 conduct placed his employment in jeopardy. The administrative law judge concludes that the discharge was based on a “current act.”

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Sireno was discharged for misconduct. Accordingly, Mr. Sireno is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer’s account shall not be charged for benefits paid to Mr. Sireno.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant’s separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency’s initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's February 20, 2009, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

The matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs