IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHERRIE L DETERMAN
Claimant

COMMUNITY HEALTH CARE INC - ADP
Employer

APPEAL NO. 15A-UI-04525-TN-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/15/15
Claimant: Appellant (2)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Sherrie Determan filed a timely appeal from a representative's decision dated April 6, 2015, reference 01, which denied unemployment insurance benefits finding the claimant was discharged from work for conduct not in the best interests of the employer. After due notice was provided, a telephone hearing was held on May 20, 2015. The claimant participated. Participating on behalf of the claimant was Ms. Katin Breedlove, Attorney at Law. The employer participated by Ms. Sarah Wallace, Human Resource Coordinator.

ISSUE:

The issue is whether the evidence in the record establishes intentional misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Sherrie Determan was employed by Community Health Care, Inc. – ADP – from August 2, 2010 until March 13, 2015, when she was discharged from employment. Ms. Determan officially held the position of full-time front desk receptionist and clerical worker and was paid by the hour. Her immediate supervisor was Amy Lang.

Ms. Determan was discharged on March 13, 2015 after another employee had reported that Ms. Determan had made racially inappropriate remarks in her presence the preceding day on March 12, 2015. Ms. Banks reported that in answer to her question as to whether two little "mixed babies" had been seen or had walked out, after answering the question, "You don't see too many good black dads in here either." Ms. Banks alleged that Ms. Determan asked Ms. Banks, "How do you do it with bi-racial children?" Ms. Banks then alleged the claimant stated she was not prejudice but did not agree with black and white but Mexican white or white and Indian are okay. Ms. Banks further asserted in her complaint that Ms. Determan concluded by saying, "I just feel sorry for the kids of black and white parents."

Ms. Banks concluded her complaint by stating that Ms. Determan's statements bothered her and that having children that are bi-racial or a husband that is black is a touchy topic. Based upon Ms. Banks' complaint, Ms. Lang, the claimant's supervisor, began an inquiry. When asked, Ms. Determan initially responded that she remembered Ms. Banks having a negative attitude the preceding day and being unhappy about being asked to do tasks and the claimant asserted that she thought Ms. Banks was upset because she had to cover the claimant the preceding Monday when Ms. Determan was gone. Upon further inquiry, when the employer referenced "bi-racial families," Ms. Determan recognized the incident and responded that the comments she made were in reference to herself and someone she had dated. Ms. Determan offered to apologize to Ms. Banks and did so.

After considering the statements attributed to Ms. Determan by Ms. Banks in her e:mail, the employer concluded based upon those statements that Ms. Determan's statements were disrespectful to Ms. Banks and violated Ms. Banks' dignity and respects in violation of the employer's code of ethical and professional conduct. (See Employer Exhibit A).

Considering whether to discharge Ms. Determan, the employer concluded that the claimant's behavior did not promote a safe, ethical and efficient and professional work environment. The employer also considered that the claimant had been warned for poor job performance in the past and was in the final warning for job performance at the time of the incident. Ms. Determan had not previously been warned or counseled about the manner in which she interacted with other employees or her demeanor while doing so. At the time of discharge, the employer stated that claimant was being terminated because she was "not a good fit for the company."

During the conversation with Ms. Banks on the day in question, the subject of mixed children was brought up by Ms. Banks when she asked about whether they had gone in for their appointment. Ms. Banks then made additional comments and Ms. Determan responded, "I'm not comfortable about dating black men . . . I feel bad for the little ones." At the time of the statement, Ms. Determan asserts she did not know that Ms. Banks had any special sensitivity to the issue. It is claimant's position that her statement about bi-racial dating and feeling sorry for the little ones was in reference to a personal situation in the past and was not intended to upset or degrade Ms. Banks. After being told of Ms. Banks' complaint, Ms. Determan personally apologized to Ms. Banks.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge in this case is whether the evidence in the hearing record establishes intentional misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does not.

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).

In discharge cases, the employer has the burden of proof to establish disqualifying conduct on the part of a claimant. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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. of Appeals 1992).

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 upon such past acts. The termination of employment must be based on a current act. See 871 IAC 24.32(8).

While hearsay is admissible in administrative proceedings, it is not accorded the same weight as firsthand, sworn testimony, providing that the firsthand, sworn testimony is credible and is not inherently improbable.

Allegations of misconduct 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 Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In the case at hand, the employer made a business decision to terminate Ms. Determan based upon an account given them by another employee concerning Ms. Determan's statements to the other employee on the day preceding Ms. Determan's discharge from employment. The other employee alleged that Ms. Determan had made strong racially charged statements with negative implications about bi-racial children and black men. Ms. Banks further asserted that the claimant had made comparisons about the acceptability of children with mixed parentage that were of other races. Ms. Banks' e:mail complaint also inferred the claimant had intentionally directed the alleged statements to Ms. Banks in particular in a demeaning way because of Ms. Banks' personal situation. In support of its position that the claimant's statements and conduct were misconduct in connection with the work, the employer has relied primarily upon hearsay evidence in support of its position.

In contrast, Ms. Determan appeared personally and testified under oath and answered questions and submitted herself to the possibility of cross-examination. The claimant testified that she did not make most of the statements attributed to her by Ms. Banks and testified that her only statements were, "I'm not comfortable about dating black men . . . I feel bad for the little ones." Ms. Determan explained that the statements were made only because Ms. Banks had raised the issue and asserts the statements reflected only her personal opinion as based upon a previous personal relationship. Ms. Determan denies any knowledge that the subject was especially a sensitive one for Ms. Banks and that her intention was not to demean or upset her co-worker. The administrative law judge finds Ms. Determan to be a credible witness and finds that her testimony was not inherently improbable and the administrative law judge, therefore, accords more weight to the claimant's sworn testimony in this matter than is accorded to the hearsay statements offered by the employer in support of their position in this matter.

The next question becomes whether the claimant's statements, in and of themselves, made in a business atmosphere, constitute disqualifying misconduct.

The administrative law judge concludes that the claimant's statements, when viewed independently without further explanation by the claimant might likely in and of themselves constitute misconduct. When viewed independently without the surrounding context, the claimant's words appear inappropriate and racially derogative against one ethnic group of the population. As such, they would not be appropriate in a business setting.

When viewed, however, in the context described by the claimant in her sworn testimony, the harshness of the claimant's statements are tempered by explanation. Ms. Determan asserts that she was only expressing a personal opinion that was based upon a past personal experience and nothing more. The administrative law judge after considering this matter at length concludes that although the claimant's statements even when viewed in the light most favorable to the claimant finds the claimant's conduct was an isolated instance of poor judgment that did not rise to the level of intentional, disqualifying misconduct. The claimant had not previously been warned about conduct or statements of this kind. Any warnings the claimant had previously received were related to her ability to meet work performance goals.

The question before the administrative law judge in this case is not whether the employer had a right to discharge Ms. Determan for this reason, but whether the discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate Ms. Determan may have been a sound decision from a management viewpoint, for the above-stated reasons, the administrative law judge concludes that the employer has not established intentional, disqualifying misconduct by a preponderance of the evidence.

Unemployment insurance benefits are, therefore, allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's decision dated April 6, 2015, reference 01, is reversed. Claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

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Terence P. Nice
Administrative Law Judge

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Decision Dated and Mailed

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