

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**NANETTE L FEESE**  
Claimant

**APPEAL NO. 19A-UI-02408-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FIVE STAR PROFESSIONAL**  
Employer

**OC: 02/24/19**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Nanette Feese filed a timely appeal from the March 14, 2019, reference 01, decision that held she was disqualified for benefits and the employer's account would not be charged for benefits, based on the deputy's conclusion that Ms. Feese was discharged on February 22, 2019 for conduct not in the best interest of the employer. After due notice was issued, a hearing was held on April 18, 2019. Ms. Feese participated. Jennifer Harsma represented the employer. Exhibit 2 was received into evidence.

**ISSUES:**

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: Jennifer Harsma owns and operates Five Star Professional, a commercial cleaning business. Nanette Feese was employed by Five Star as a part-time cleaner from April 2018 until February 22, 2019, when Ms. Harsma discharged her from the employment. Ms. Feese's work days were Monday through Friday. At the time of discharge, Ms. Harsma referenced Ms. Feese's health issues as the basis for the employer's decision to end the employment. The employer now alleges a January 29, 2019 final incident as the basis for the discharge decision. On January 29, 2019, Ms. Feese contacted Ms. Harsma regarding the lack of a functioning vacuum at a particular customer location. Ms. Feese mentioned during the conversation that she had tried both Five Star's vacuum and the customer's vacuum, but that neither worked. Ms. Harsma discourages use of customer equipment and supplies. Ms. Harsma did not say anything close in time to the January 29, 2019 conversation to place Ms. Feese on notice that the reference to use or attempted use of the customer's vacuum could or would serve as the basis for discharging Ms. Feese from the employment. Ms. Feese thereafter continued to report for work

and perform her work duties without further incident until the employer discharged her in February 22, 2019.

### **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 871 IAC 24.32(4).

The evidence in the record establishes a discharge that was not based on a current act of misconduct. The purported vacuum use concern that the employer alleges triggered the discharge came to the employer's attention more than three weeks prior to the discharge date. During that time, the employer did not say anything to Ms. Feese to put her on notice that her employment was in jeopardy in connection with the matter. The discharge occurred in the context of Ms. Feese's discussion with the employer regarding her health concerns. The employer asserts on the one hand that Ms. Feese was an excellent worker, but on the other hand that she was a rule breaker and trouble maker. The two sets of assertions are contradictory and undermine the employer's credibility. In the absence of proof of a current act of misconduct, the discharge from the employment would not disqualify Ms. Feese for unemployment insurance benefits or relieve the employer's account of liability for benefits. In the absence of proof of a current act of misconduct, the administrative law judge need not further consider the employer's alleged earlier concerns. Ms. Feese is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

**DECISION:**

The March 14, 2019, reference 01, decision is reversed. The February 22, 2019 discharge was not based on a current act. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/scn