**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**DAVID C WENMAN**
Claimant

**THE MAYTAG CO**
Employer

**APPEAL NO. 08A-UI-08005-JTT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 01/13/08 R: 03**
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The Maytag Corporation filed a timely appeal from the August 29, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 23, 2008. Claimant David Wenman participated. Robert Chavarry, Human Resources Manager, represented the employer. Exhibits One through Four were admitted 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: David Wenman was employed by The Maytag Corporation/Whirlpool from April 4, 2008 until July 30, 2008, when Robert Chavarry, Human Resources Manager, discharged him from the employment. On or about May 26, 2008, a female coworker reported to the employer that Mr. Wenman had said in casual conversation that he wanted to rape her. The same female coworker had reported to the employer that Mr. Wenman had twice touched her buttocks. The female employee may have a hearing impairment. The female employee is still with the employer, but did not testify. A third employee was working in the same area, but neither heard the remark the female employee attributed to Mr. Wenman, nor saw the alleged physical contact. Mr. Chavarry interviewed both employees separately and then together. The female employee provided a written statement. Mr. Chavarry concluded that the female employee's verbal and written statements were more credible than Mr. Wenman's statement or explanation of events. Mr. Chavarry concluded Mr. Wenman had violated the employer's Anti-Harassment policy and discharged Mr. Wenman from the employment. There was no other basis for the discharge.

**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).

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). 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 employer has failed to produce sufficient evidence, and sufficiently direct and satisfactory evidence, to establish misconduct in connection with the employment. The employer had the ability to produce more direct and satisfactory evidence than it presented, but elected not to produce that evidence. The employer discharged Mr. Wenman based on a serious allegation made by a female coworker. The nature of the allegation, the fact that it concerned an isolated incident, and the fact that another employee in close proximity neither saw nor heard anything, made the reliability and credibility of the female employee an important factor to be considered. Mr. Wenman's assertion that the female employee may have a hearing impairment called into question the reliability of the female employee's allegation. The employer conducted its own investigation and drew its own conclusions about the credibility of the parties involved. By failing to present testimony from the female employee, or other employees with firsthand knowledge of the event in question, the employer has prevented the administrative law judge from fully inquiring into the facts. The very thing the employer deemed essential to its investigation, that is, hearing from both parties involved, the employer has denied the administrative law judge. It would be inappropriate for the administrative law judge to delegate to the employer the task of determining the credibility of the complaining female employee and weighing her statement against Mr. Wenman's testimony. The written statement from the female employee is not a substitute for testimony and does not outweigh the firsthand testimony provided by Mr. Wenman.

Though it was within the employer's discretion to discharge Mr. Wenman from the employment, the administrative law judge concludes, based on the evidence in the record, that Mr. Wenman was discharged for no disqualifying reason. Accordingly, Mr. Wenman is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Wenman.

**DECISION:**

The Agency representative's August 29, 2008, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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