

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARK MONTGOMERY
Claimant

APPEAL NO. 13A-UI-06024-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

COSTCO WHOLESALE CORPORATION
Employer

**OC: 04/21/13
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Mark Montgomery filed a timely appeal from the May 20, 2013, reference 04, decision that denied benefits. After due notice was issued, a hearing was held on June 27, 2013. Mr. Montgomery did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Jenny Loeser, Payroll Clerk, represented the employer. Exhibits One through 10 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: Mark Montgomery was employed by Costco as a part-time maintenance assistant from June 2012 until April 23, 2013 when Assistant Manager Ingrid Chase and General Manager David Pierce discharged for purported meal break violations. The employer's policy required that any employee working five hours or more must take and clock out for a 30-minute meal break. If an employee clocked out for meal break five hours and one minute into his shift, the employer would consider that a meal break violation. The final incident that triggered the discharge occurred on April 16, 2013. The employer witness does not know how long Mr. Montgomery worked that day. The employer witness does not know whether or when Mr. Montgomery clocked out for his meal break. The employer alleges several additional meal break violations, including purported violations on April 1, 2, 5 and 15, but the employer witness does not know the particulars of any of the purported violations.

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) alone. 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 failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish a current act of misconduct in connection with the employment. The employer witness lacked personal knowledge of the incidents that factored in the discharge and was not involved in the discharge decision. The employer had the ability to present testimony from persons with personal knowledge of the events that factored in the discharge. The employer elected not to present such evidence. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Montgomery was discharged for no disqualifying reason. Accordingly, Mr. Montgomery is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The agency representative's May 20, 2013, reference 04, decision is reversed. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs