IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

MICHAEL A ADAMS
Claimant

MENARD INC
Employer

APPEAL NO. 18A-UI-09815-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/02/18
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 21, 2018, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on September 3, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on October 9, 2018. Claimant Michael Adams participated. Austin Stewart, Store Counsel, represented the employer and presented testimony through Darrell Weden. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO), which record reflects that no benefits have been disbursed to the claimant in connection with the September 2, 2018 original claim. Exhibits 1 through 13 were 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 employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Michael Adams was employed by Menard, Inc. as a full-time Second Assistant Building Materials Department Manager at the employer's Muscatine store until September 3, 2018, when Darrell Weden, General Manager, discharged him from the employment. Eva Birch, Human Resources Coordinator, was also present at the discharge meeting. Mr. Adams began his employment in 2000. Mr. Adams became Second Assistant Building Materials Department Manager toward the start of 2018. Prior to that, Mr. Adams was Assistant Millwork Manager for about four years. Mr. Adams' girlfriend, Autumn Veech, worked at the Muscatine Menard's store as the Cabinets and Appliances Department Manager. The employer's work rules did not prohibit such personal relationships amongst store employees so long as one party to the relationship did not supervise the other.

At the start of the employment, the employer provided Mr. Adams with written work rules that included a list of prohibited acts that could result in disciplinary action. The list included the following:

> Theft, attempted theft, time theft, misuse or unlawful removal from premises of any company, Team Member or guest property.
> …
> Selling or buying company merchandise or services at other than authorized prices.

These same prohibited acts continued to be part of the employer's written work rules through the end of Mr. Adams' employment. Mr. Adams was at all relevant times aware of the rules and as a manager shared responsibility for ensuring compliance with the work rules.

The employer also provided Mr. Adams with a managers' manual that Mr. Adams most recently acknowledged at the start of 2018. The managers' manual imposed on Mr. Adams the obligation to "[h]ave a thorough knowledge of Menard store policies and procedures, especially P/P #151 – Conflict of Interest." The conflict of interest policy included the statement that, "No Team Member should benefit personally from any purchase or non-purchase of goods or services by Menards nor derive personal gain from action taken as a representative of Menards." The conflict of interest policy imposed on Mr. Adams an obligation "to ask if an activity might result in a conflict of interest" if he did not know the answer. Mr. Adams was at all relevant times aware of the conflict of interest policy.

On August 25, 2018, Mr. Adams and his girlfriend, Ms. Veech, conspired to significantly mark down a floor model microwave oven/hood so that Mr. Adams could purchase the microwave oven/hood for the drastically discounted price of $19.00. The microwave over/hood in question was a model that the store did not carry in stock but one that customers could special order. The particular display microwave in question had a broken handle. The store's standard practice for dealing with such situations was to contact the manufacturer for a replacement part or a replacement display model. As Appliance Department Manager, Ms. Veech was responsible for contacting the manufacturer for those purposes. The original retail price for the microwave was $699.00, though it may have been marked down as low as $450.00 before Ms. Veech marked it down to $19.00 so Mr. Adams could purchase it for that price on August 25. Though the microwave had never been used, Ms. Veech re-categorized the microwave as a "bargain used appliance" in connection with taking the drastic markdown. In taking the markdown, Ms. Veech reduced the price the lowest price possible for a "bargain used appliance." To avoid taking the item through the front lane per standard operating procedure, Ms. Veech created a "picking ticket" so that Mr. Adams could pay the discounted price for the item at the front register by just presenting the picking ticket and without presenting the item being purchased. The allowed the pair to avoid drawing attention to the drastic mark down or Mr. Adams' windfall in connection with the markdown. Ms. Veech wheeled the microwave to the order pick up area at the back of the store where customers would ordinarily pick up items too big to carry or push out the front door of the store. Mr. Adams waited until the employee in charge of the order pick area went on break and then printed a bar code sticker to mark the item as his so that he could pick it up at some later point. Mr. Adams was aware that the employer's policies prohibited him from printing his own sticker in connection with his own purchase. Mr. Adams and Ms. Veech then left the microwave shelved in the order pick area.

The self-dealing conduct came to the employer's attention on September 2, 2018, when a department head was conducting an audit of the "pre-paid" inventory in the order pick up area. The department head noted the discrepancy between the value of the microwave and the $19.00 purchase price and reported the matter to Mr. Adams' supervisor, Brian Hendricks,

Materials Department Manager. Mr. Hendricks brought the matter to the attention of Mr. Weden, the General Manager, that same day. On September 3, Mr. Weden investigated the matter by reviewing the transaction records and surveillance records that depicted the various steps in the self-dealing plot. After he discharged Ms. Veech from her employment, Mr. Weden met with Mr. Adams. Mr. Adams asserted that he had been unaware that he had done anything wrong. Mr. Weden balked at the assertion and referenced Mr. Adams' 18 years of employment. Mr. Weden proceeded to discharge Mr. Adams from the employment. At that time, Mr. Adams offered to pay an appropriate amount for the microwave.

Mr. Adams established an original claim for benefits that Iowa Workforce Development deemed effective September 2, 2018. Mr. Adams did not make any weekly claims and had not received any benefits in connection with the original claim.

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(4).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.,* 494 N.W.2d 660 (1993).

The weight of the evidence in the record establishes a discharge for misconduct in connection with the employment. Iowa Code section 714.1 sets forth the several ways in which a person can commit the criminal offense of theft in the state of Iowa and states, in relevant part, as follows:

> 714.1 Theft defined.
> A person commits theft when the person does any of the following:
> 1. Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.
> 2. Misappropriates property which the person has in trust, or property of another which the person has in the person's possession or control, whether such possession or control is lawful or unlawful, by using or disposing of it in a manner which is inconsistent with or a denial of the trust or of the owner's rights in such property, or conceals found property, or appropriates such property to the person's own use, when the owner of such property is known to the person.

The employer reasonably concluded, and the weight of the evidence in the record establishes, that Mr. Adams conspired with Ms. Veech to take control of and dispose of the several hundred dollar microwave oven/hood in a manner inconsistent with Menard's ownership interest in the merchandise. Mr. Adams and Ms. Veech conspired to have Ms. Veech take a deep, unauthorized discount on the appliance so that Mr. Adams could then purchase the item at that deep discount, thereby depriving Menard's of the revenue that might otherwise had been generated through sale of the appliance. Mr. Adams and Ms. Veech further conspired to hide their self-dealing conduct through use of the picking ticket and through use of the pre-paid order pick up area. The fact that Mr. Adams and Ms. Veech were not ultimately successfully in carrying off the theft of merchandise by removing it from the store does not erase the intention to commit theft from the employer in willful and wanton disregard of the employer's interests. Mr. Adams had worked for the employer for 18 years and had been a manager for almost five of those years. Mr. Adams' assertion that he did not know he was violating employer policy and acting adverse to the employer's interests is implausible and not credible. Mr. Adams' attempt during the hearing to shift sole responsibility for the wrongdoing onto Ms. Veech was not lost on the administrative law judge. The weight of the evidence establishes that Mr. Adams was a full participant in the plan to gain a windfall benefit at the employer's expense.

The evidence in the record establishes a discharge for misconduct in connection with the employment. Accordingly, Mr. Adams is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Adams must meet all other eligibility requirements. The employer's account shall not be charged.

Because no benefits have been disbursed in connection with the claim, there is no overpayment of benefits to be addressed.

DECISION:

The September 21, 2018, reference 01, decision is reversed. The claimant was discharged on September 3, 2018 for misconduct in connection with the employment. 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 amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs