

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIE F UNDERWOOD
Claimant

APPEAL NO. 10A-UI-04772-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NELLIS MANAGEMENT COMPANY
Employer

**Original Claim: 02/28/10
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Willie Underwood filed a timely appeal from the February 28, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 11, 2010. Mr. Underwood participated. Ken Wentze of TALX represented the employer and presented testimony through Cindy Obermiller, Shawn Riede, and Celeste Lievens. Exhibits One through Nine 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: The employer operates a Long John Silver's restaurant. Willie Underwood was employed as a part-time cashier from January 2009 until February 28, 2010, when Cindy Obermiller, Area Manager, and Ken Waltman, Vice President, discharged Mr. Underwood from the employment.

The events that triggered the discharge occurred on February 27, 2010. During that shift, multiple individuals observed that Mr. Underwood was behaving in an unusual manner. At one point during the shift, Crew Chief Shawn Riede pulled Mr. Underwood aside and asked him what was wrong. Mr. Underwood told Mr. Riede that a member of his family has been shot. Mr. Riede told Mr. Underwood to calm down, take a break, and return to his duties. Mr. Riede had not personally noted anything of concern with Mr. Underwood's behavior and saw no need for additional action during the shift. The next day, a couple of employees suggested that Mr. Underwood might have been drinking at work during the February 26, 2010 shift. The employer lacks an alcohol/drug testing policy. Mr. Riede had been in close proximity to Mr. Underwood during the February 27 shift and had not observed anything to indicate Mr. Underwood had been drinking. Other employer's made additional allegations regarding Mr. Underwood's conduct during the February 27 shift. One employee alleged that Mr. Underwood had placed his fingers in a female coworker's mouth. The female coworker's

family had eaten in the restaurant that night. The female coworker's mother was uncomfortable when Mr. Underwood placed his hand on her while she ordered her dinner.

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).

This is an instance where the employer clearly had the ability to present much more direct and satisfactory evidence than was presented. Aside from the testimony from Ms. Lievens regarding the awkward hand touching, the employer presented no testimony from any person who actually observed disconcerting conduct on the part of Mr. Underwood during the shift in question. Mr. Riede had been partially in charge of the shift, and indicated in his testimony that he saw no conduct that caused him concern or that led him to think additional action was necessary. The way the employer went about collecting statements from employees was fundamentally flawed. Rather than retyping verbal statements allegedly provided, the better practice would have been to simply have the employees or others write their own statements. The weight the administrative law judge can give to the written statements is greatly diminished by the manner in which they were created. The administrative law judge concludes that the employer has presented insufficient evidence, and insufficient direct and satisfactory evidence, to establish misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Underwood was discharged for no disqualifying reason. Accordingly, Mr. Underwood is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Underwood.

DECISION:

The Agency representative's February 28, 2010, reference 01, 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/kjw