IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

EDITH M BUNCH
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 07A-UI-00728-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/10/06 R: 03
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Edith Bunch filed a timely appeal from the January 11, 2007, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on February 6, 2007. Ms. Bunch participated. Alyce Smolsky of Johnson & Associates/TALX UC eXpress represented the employer and presented testimony through Housekeeping Supervisor Kelly White and Administrator Alan Blakestad. Employer's Exhibits One through Six 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: Edith Bunch was employed by Care Initiatives as a full-time housekeeping aid from October 22, 1986 until December 6, 2006, when Administrator Alan Blakestad discharged her. Ms. Bunch's immediate supervisor was Housekeeping Supervisor Kelly White. Ms. Bunch's final wage was $10.97 per hour.

The final incident that prompted the discharge occurred on November 25 and came to the attention of Ms. White the same day. On Saturday, November 25, Ms. White was off-duty when she observed Ms. Bunch and another employee at Veridian Credit Union at 11:25 a.m. Ms. White then observed Ms. Bunch and the other employee in a drive-through line at a nearby Burger King. Ms. White ceased observing the pair at 11:35 a.m. Both the credit union and the restaurant were about a mile from Parkview Nursing Center where Ms. Bunch worked. Ms. White knew that Ms. Bunch ordinarily commenced her lunch break at 11:30 a.m. and wondered whether Ms. Bunch had left the workplace without clocking out. When Ms. White returned to the workplace on Monday, November 27, she reviewed Ms. Bunch's timecard and saw that on November 25 Ms. Bunch had not clocked out for lunch until 11:44 a.m. and had clocked back in at 12:16 p.m. Ms. White concluded that Ms. Bunch had in fact left the workplace without clocking out, had not clocked out for her half hour lunch break until she had

returned from her errands, and then had taken a full half-hour lunch break. Ms. White reported the incident to Administrator Alan Blakestad. Mr. Blakestad reported the matter to a corporate human resources representative.

Ms. Bunch was off work on Monday through Tuesday, November 27-28. The employer wanted to wait until Ms. Bunch and the other employee were both at the workplace before interviewing the pair.

On November 30, the corporate human resources representative notified Mr. Blakestad that the employer considered the conduct an omission or falsification of a company record and that the consequence would be discharge from the employment. On the same day, Mr. Blakestad interviewed Ms. Bunch and the other employee regarding the November 25 incident. Ms. Bunch indicated that she had gone to lunch at 11:25 or 11:30, had forgotten to clock out before leaving the facility, and had clocked out as soon as she returned to the facility. The employer utilizes as credit card type ID that employees swipe through a time-clock to clock in and out. If an employee forgets to clock in or out, there is a clipboard next to the time-clock that the employee can use to report the error. Ms. Bunch did not utilize the clipboard in connection with her November 25 lunch break.

At the end of the interview on November 30, Mr. Blakestad advised Ms. Bunch and the other employee that the consequences of their conduct could be “very grave.” Mr. Blakestad did not specifically indicate that the consequences might include discharge from the employment. Mr. Blakestad next spoke with Ms. Bunch and the other employee on December 4. At that time, Mr. Blakestad advised that one option was to suspend the employees. Mr. Blakestad told Ms. Bunch that he hated to fire her and that she had been a good employee. Mr. Blakestad indicated that he would be speaking to a superior. Mr. Blakestad ultimately executed the discharge on December 6. Ms. Bunch had received no prior reprimands for conduct involving dishonesty.

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 evidence in the record indicates that the conduct that prompted the discharge came to the employer's attention on November 25. The evidence indicates that the employer's delay in taking further action on the matter was not attributable to any need for further investigation, but was instead based on the employer's convenience and the employer's self-imposed administrative hurdles to disciplining Ms. Bunch. Despite the fact that Ms. Bunch was off work on November 27 and 28, the evidence indicates that Ms. Bunch was available to the employer prior to November 27 and at all times thereafter. The evidence indicates that the employer delayed the interview of Ms. Bunch until November 30, when the same interview could have taken place on November 25, the date of the incident. The evidence indicates, in the context of a 20-year employment without prior reprimands for similar conduct, that a reasonable person in Ms. Bunch's position would not have concluded from Mr. Blakestad's reference on November 30 to "very grave" consequences that this included possible discharge from the employment. In addition, Mr. Blakestad's comments on December 4 indicated that the "grave consequences" he had been considering concerned a suspension. Mr. Blakestad made no reference to Ms. Bunch about a possible discharge from the employment until December 6, the date on which he actually discharged Ms. Bunch. The administrative law judge concludes that the employer unreasonably delayed action on the November 25 conduct for 11 days and that this delay caused the November 25 conduct to no longer constitute a "current act" at the time of discharge. See 871 IAC 24.32(8). Based on the absence of a "current act," the administrative law judge concludes that Ms. Bunch was discharged for no disqualifying reason.

Even if the administrative law judge were to conclude a "current act" existed, the greater weight of the evidence would indicate misconduct, but not substantial misconduct. The evidence indicates that on November 25 Ms. Bunch left to pick up her lunch while she was still clocked in and purposely waited until she returned to the workplace to clock out for her half-hour lunch break. The evidence indicates that Ms. Bunch most likely left the workplace at approximately 11:20 a.m. and returned to the workplace in time to clock out at 11:44 a.m. This amounted to a 24-minute unauthorized absence from the workplace. Considering Ms. Bunch's $10.75 hourly wage, the unauthorized absence cost the employer $4.30. The evidence in the record fails to establish any prior reprimands for similar conduct and suggests that this was an isolated incident during a 20-year period of employment. The conduct represented intentional misconduct. However, in the context of a 20-year employment without prior similar reprimands, the administrative law judge concludes that conduct did not rise to the level of substantial misconduct necessary to disqualify Ms. Bunch for unemployment insurance benefits.

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

DECISION:

The Agency representative's January 11, 2007, reference 02, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she 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

jet/kjw