IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BURNS, JAMES, A
Claimant

AMERICAN BLUE RIBBON HOLDINGS LLC
Employer

APPEAL NO. 13A-UI-04656-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/24/13
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

James Burns filed a timely appeal from the April 8, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 28, 2013. Mr. Burns participated. Tom Kuiper of Equifax Workforce Solutions represented the employer and presented testimony through Donna Johnson.

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: James Burns was employed by American Blue Ribbon Holdings, L.L.C., d/b/a Village Inn, from 2003 until March 20, 2013, when Donna Johnson, Regional Manager, discharged him from the employment for having one or more servers work off the clock in violation of company policy. From January 2012 to March 20, 2013, Mr. Burns was the full-time Assistant Manager at the employer's Cedar Rapids restaurant. Mr. Burns had entered the employer's management training program in August 2011. Up to that time, Mr. Burns had worked for the employer as a food and beverage server.

On March 18, 2013, Mr. Burns had server Edie Rodriguez come back early from her half-hour break to perform work. Mr. Burns had Ms. Rodriguez use another employee's PIN to enter a food order. Mr. Burns had the authority to have Ms. Rodriguez come back early from break, but company policy and state and federal law required that he have her clock in if she was performing work. Mr. Burns knew it was company policy not to have employees performing work off-the-clock. Mr. Burns knew the policy at the time he was a server. Mr. Burns knew the policy when he was an Assistant Manager and had new employees acknowledge the written policy. To comply with company policy, Mr. Burns would have to swipe his manager card at the computer and then have Ms. Rodriguez enter her employee PIN. The process would take less than 30 seconds. Mr. Burns elected not to have Ms. Rodriguez clock in before the end of her break to avoid creating a record that he brought her back from break early and, thereby, added

to labor costs. Mr. Burns also knew it was a violation of company policy to have an employee work under another employee's PIN. Ms. Rodriguez reported the March 18 incident to Ms. Johnson. At the time, Ms. Johnson addressed the matter with Mr. Burns, Mr. Burns asserted that he had had Ms. Rodriguez work off the clock because he had not been feeling well and did not want to cough on the guests at their table. Mr. Johnson had been feeling well enough that day to carry out his management duties.

In the course of investigating the March 18 incident, Ms. Johnson learned of an incident a month earlier wherein Mr. Burns had directed another server, Lacey Johnson, to work off-the-clock. That employee had refused to do so and later alleged that her work hours had been cut as a result.

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).

Mr. Burns was less than forthcoming in his testimony. Mr. Burns repeatedly hedged on his answers to avoid providing direct answers to clearly stated questions. Mr. Burns' assertion that he was unaware of the policy regarding not having employees work off-the-clock was not credible. Mr. Burns had worked for the employer for about a decade. Mr. Burns had worked as a manager for over a year. The weight of the evidence establishes that Mr. Burns knowingly and willfully violated the employer's policy by having Ms. Rodriguez work off the clock and by having her use another employee's login ID to perform work while off the clock. Mr. Burns' conduct subjected the employer to potential liability and sanctions for failing to pay the employee her proper wages.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Burns was discharged for misconduct. Accordingly, Mr. Burns is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Burns.

DECISION:

The Agency representative's April 8, 2013, reference 01, decision is affirmed. The claimant was discharged for misconduct. 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 allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/pjs