

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLY D WHITAKER
Claimant

APPEAL NO. 14A-UI-06613-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DES MOINES REGISTER & TRIBUNE
Employer

OC: 08/04/13
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Kimberly Whitaker filed a timely appeal from the June 24, 2014, reference 02, decision that disqualified her for benefits. After due notice was issued, a hearing was held on July 17, 2014. Ms. Whitaker participated personally and was represented by attorney, Jessica Taylor and law student, Leah Carter. Theresa Allen, Senior Human Resources Business Partner, represented the employer and presented testimony through Marsha Mills, Budget Manager. The administrative law judge took official notice of the documents submitted for and generated in connection with the fact-finding interview. Those documents were provided to the parties prior to the appeal hearing.

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: Kimberly Whitaker was employed by the Des Moines Register & Tribune as a full-time customer service specialist from September 2013 until June 6, 2014, when Theresa Allen, Senior Human Resources Business Partner, and Marsha Mills, Budget Manager, discharged her from the employment. Ms. Whitaker started the employment as an advertising customer service specialist. In March, the employer moved Ms. Whitaker's work space to the lobby and expanded her duties to general customer service. At that point, Ms. Mills became Ms. Whitaker's immediate supervisor. Ms. Whitaker worked at the lobby desk with one other customer service employee, Jean Nicholls. Ms. Whitaker and Ms. Nicholls each had a variety of tasks assigned to them at the front desk. Some were shared responsibilities and some were individual responsibilities. When Ms. Whitaker started working at the front desk, she added the front desk duties to the duties she had previously performed as an advertising customer service representative.

The final incident that triggered the discharge occurred on June 2, 2014. On that day, Ms. Whitaker accepted \$170.00 cash from a customer as payment for an ad without

documenting what the money was for. The customer had been working with an advertising representative, Suzanne Cruz, in reference to a proposed ad. When the customer presented his payment on June 2, Ms. Whitaker contacted Ms. Cruz to get a price for the ad because neither the ad nor the ad account had been created in the employer's computer system. Because the ad account had not yet been created, the employer's computer system did not generate a receipt as it would have done if the ad had already been in the employer's computer system. Ms. Whitaker accepted payment for the ad and placed the money in the cash drawer without any notation regarding what the money was for. Ms. Whitaker cites as reason for not documenting the source of the cash the fact that the customer service desk was busy at the time. Ms. Whitaker knew that the employer required documentation of the source of revenue received by the front desk staff. In April, Ms. Mills had sent an email to Ms. Whitaker and Ms. Nicholls wherein she specifically advised them it was mandatory to generate a receipt for the customer and to create an internal receipt for each transaction. Ms. Whitaker did not go back later and generate any documentation concerning the source of the \$170.00. The next day, Loretta Grant, Accounting Specialist, reviewed the money bag containing the revenue from June 2 and determined that bag contained more than \$180.00 more than the receipts for the day indicated it should contain. Ms. Grant investigated the matter and was ultimately able to determine that \$170.00 of the overage came from the ad for which Ms. Whitaker had not generated a receipt.

In March 2014, Ms. Mills counseled Ms. Whitaker concerning time management, focusing on time sensitive obituaries during a portion of the afternoon so that they could run in the paper on time, staying focused and professional when interacting with customers, and not sharing privileged information she learned through the employment without authorization. Ms. Mills had observed that Ms. Whitaker socialized with customers too much when transacting business with them and that Ms. Whitaker had the habit of injecting her personal thoughts in business transactions where they did not belong. Ms. Mills concluded that the excessive socializing with customers contributed to Ms. Whitaker not performing some of her duties in a timely manner.

On May 9, Ms. Mills issued a written reprimand to Ms. Whitaker in connection with multiple instances of negligence on the part of Ms. Mills during the preceding three weeks. Ms. Whitaker was required to go into the employer's computer system and approve ads so that they could promptly run in the newspaper. On multiple occasions, Ms. Mills had not promptly approved an ad, the ad was delayed, and the employer had to take extra steps to appease customers whose ad did not run promptly. Ms. Whitaker had received appropriate training in approving ads. Ms. Mills again addressed what she perceived to be Ms. Whitaker's excessive socializing during business transactions and her time management issues. In one instance, Ms. Mills overheard Ms. Whitaker provide a play-by-play description of an acrobat's performance to a customer with whom she was supposed to be transacting business on the telephone. Ms. Mills had on several occasions overheard Ms. Mills engaging in personal conversation with customers rather than sticking to the business at hand. Ms. Mills warned Ms. Whitaker that she faced discharge from the employment if she did not demonstrate immediate improvement.

On May 14, Ms. Mills issued a written reprimand to Ms. Whitaker for unauthorized sharing of privileged information on a social media website. Ms. Mills directed Ms. Whitaker to remove the material from the website and warned of future discipline or discharge if the conduct continued.

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.

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 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 final incident that triggered the discharge was the cash handling matter. In that instance, Ms. Whitaker was negligent in failing to generate any documentation that would assist the employer in connecting the cash Ms. Whitaker received from the customer to any particular transaction. Regardless of whether Ms. Whitaker felt she had all the necessary training to operate the software system, she clearly had the ability to generate some documentation in connection with the transaction and failed to generate any documentation. The evidence establishes only the one instance of Ms. Whitaker failing to generate a receipt for a transaction. The question becomes whether the final incident and the employer's prior concerns indicate a pattern of carelessness, negligence, or willful disregard of the employer's interests. The administrative law judge concludes there is a pattern indicating an intentional disregard of the standards of behavior the employer reasonably expected of Ms. Whitaker. Ms. Whitaker was twice counseled for sharing privileged information, placing her desire to socialize above the employer's interests. A reasonable person working for a media outlet would understand that the flow of information, and right to exercise control over the flow of information, was the essence of the employer's business. On multiple other occasions, Ms. Whitaker neglected time-sensitive tasks without good cause for doing so.

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

DECISION:

The claims deputy's June 24, 2014, reference 02, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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