IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

BRIDGETTE M WASHINGTON
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO. 18A-UI-07107-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/03/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Bridgette Washington filed a timely appeal from the June 22, 2018, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Washington was discharged on June 5, 2018 for violation of a known company rule. After due notice was issued, a hearing was held on July 18, 2018. Ms. Washington participated. Mehdina Kurtovic represented the employer. Exhibits A through E 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: Bridgette Washington was employed by Tyson Fresh Meats, Inc. as a full-time production worker from July 2016 until May 14, 2018, when Jim Hook, Human Resources Complex Manager, discharged her from the employment. Ms. Washington had a quasi-supervisory position with the employer. In April 2018, Ms. Washington was absent without notifying the employer. Ms. Washington understood that the absence put her over the employer's allowable number of attendance points. Following the no-call/no-show absence, Ms. Washington contacted Mr. Hook. Ms. Washington told Mr. Hook that she had relapsed in her substance abuse recovery. Ms. Washington asked to be allowed to continue in the employment and to be allowed to participate in the employer's "Options" program in lieu of being discharged for attendance.

The Options program is outlined in the employer's substance abuse policy. The substance abuse policy is set forth in the employee handbook the employer provided to Ms. Washington at the start of her employment. Under the Options program, employees may be granted a leave of absence not to exceed 30 days for the purpose of participating in substance abuse rehabilitation. Under the policy, an employee who returns within the required period, who

provides proof of completion of substance abuse treatment, and who tests negative on a return-to-work drug test, will be allowed to return to the employment following the leave of absence.

Mr. Hook conditioned his approval of Ms. Washington participation in the Options program on Ms. Washington's supervisor being willing to overlook the April 2018 no-call/no-show absence. Ms. Washington's supervisor acquiesced in disregarding the no-call/no-show absence. Ms. Washington commenced a leave of absence with a May 17, 2018 return-to-work deadline. At the time Ms. Washington commenced the approved leave of absence, she understood that she would be required to present proof that she had "graduated" from treatment when she returned to the employment at the end of the approved leave.

On April 25, 2018, Ms. Washington underwent a substance abuse evaluation and was referred to extended outpatient treatment. On April 26, 2018, Ms. Washington commenced the program of extended outpatient treatment. The treatment regimen included three one-on-one counseling sessions per week and two group counseling sessions per week. On May 9, 2018, the substance abuse evaluator provided Ms. Washington with a memo that stated as follows: "Based on her reports of stability in her recovery, Bridgette Washington has completed required substance abuse treatment outside of work at this time." The memo was from Jordan Dunn, LISW IADC of Pathways Behavioral Services and appeared on Pathways letterhead.

On Friday, May 11, 2018, Ms. Washington returned to work. Ms. Washington took with her Mr. Dunn's May 9, 2018 memo indicating that she had completed required substance abuse treatment. At the time Ms. Washington return to work, Mr. Hook was in a meeting and unavailable. Ms. Washington delivered the May 9 memo to the company nurse and underwent a return-to-work drug test that was negative for controlled substance. Ms. Washington completed her shift on May 11.

Ms. Washington was next scheduled to work on Monday, May 14, 2018. Ms. Washington reported for work on May 14, 2018. A short way into the shift, Mr. Hook summoned Ms. Washington to a meeting. Mr. Hook told Ms. Washington that the memo she had submitted to the company nurse was insufficient proof that she had successfully completed drug treatment and that he expected a certificate of completion. Mr. Hook told Ms. Washington that her employment was terminated.

Despite the fact that Mr. Hook had told Ms. Washington on May 14, 2018 that her employment was terminated, the employer sent Ms. Washington a letter on May 29, 2018 by certified mail. The letter was a "72 hour" form letter. The letter indicated that Ms. Washington had 72 hours in which to provide additional documentation that she had completed substance abuse treatment. Ms. Washington received the letter on May 30, 2018. On May 31, 2018, Ms. Washington called the workplace and left a voicemail message for Mr. Hook. Mr. Hook did not return Ms. Washington's call.

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 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).

The evidence in the record establishes a May 14, 2018 discharge for no disqualifying reason. The administrative law judge notes that the employer elected not to provide testimony from persons with personal knowledge of the circumstances surrounding Ms. Washington’s separation from the employer. On May 11, 2018, Ms. Washington returned from an approved leave of absence. Ms. Washington submitted to return-to-work drug testing that indicated she did not have controlled substance in her body. Ms. Washington brought with her a memo from the substance abuse evaluator and treatment provider. That memo indicated that

Ms. Washington had successfully completed “required” outpatient treatment. A reasonable person would conclude the reference to “required” treatment referred to the employer’s requirement under the Options program. The date of the memo raises some questions regarding how far along Ms. Washington had actually progressed in treatment following the April 26, 2018 recommendation for *extended* outpatient treatment. It would not be possible to complete a course of *extended* outpatient treatment in the 13 days between April 26, 2018 and May 9, 2018. However, a reasonable person would find the memo to be sufficient proof of good faith participation in drug treatment in satisfaction of the employer’s “Options” program. Ms. Washington’s inability to meet the employer’s expectation that she provide a certificate of completion did not constitute willful misconduct and, therefore, would not disqualify her for unemployment insurance benefits. The correspondence at the end of May, two weeks after Mr. Hook had notified Ms. Washington she was discharged from the employment, is immaterial in light of the earlier discharge.

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

DECISION:

The June 22, 2018, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The discharge was effective May 14, 2018. 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/rvs