

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DENISE E LOPEZ**  
Claimant

**APPEAL NO. 07A-UI-01070-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GOODWILL INDUSTRIES  
OF CENTRAL IOWA INC**  
Employer

**OC: 01/07/07 R: 02**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

Goodwill Industries of Central Iowa filed a timely appeal from the January 25, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 14, 2007. Claimant Denise Lopez participated. Marlyn McKeen, President, represented the employer. The administrative law judge took official notice of the Agency's record of payments to the claimant and received employer's Exhibits One through Three 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: Denise Lopez was employed by Goodwill Industries of Central Iowa as a full-time assistant manager from August 16, 2005 until December 28, 2006, when the store manager, retail coordinator and retail director discharged her. The final incident that prompted the discharge occurred on December 16, 2006. The employer had just installed an emergency eyewash station in the warehouse area of its store. The employer had not provided any training to the staff regarding the eyewash station. On December 16, the store manager asked Ms. Lopez to move some boxes from the vicinity of the eyewash station. Ms. Lopez complied with the directive as she understood it. On December 18, the store manager returned to the workplace and concluded that Ms. Lopez had not complied with the directive to move the boxes. When Ms. Lopez appeared for work on December 28, the store manager and retail coordinator discharged her for an alleged safety violation concerning the eyewash station and for an alleged third work rule violation.

## 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).

The evidence in the record establishes fails to establish a "current act" upon which a disqualification for benefits could be based. The evidence indicates that the alleged conduct, or omission, that prompted the discharge came to the employer's attention on December 18, but was not discussed with Ms. Lopez until 10 days later, when the employer discharged

Ms. Lopez. The employer unreasonably delayed taking action on the alleged conduct and this delay caused the alleged conduct to no longer constitute a "current act." See 871 IAC 24.32(8). Because the evidence fails to establish a "current act," the administrative law judge concludes that Ms. Lopez was discharged for no disqualifying reason and is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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).

Even if the evidence in the record established a "current act," the evidence in the record would be insufficient to prove, by a preponderance of the evidence, that misconduct occurred. The employer failed to present any testimony from individuals with firsthand knowledge of the alleged misconduct, despite having the ability to present such evidence.

**DECISION:**

The Agency representative's January 25, 2007, reference 01, decision is affirmed. 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