IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CRYSTAL GARNER
Claimant

PROGRESSIVE CASUALTY INS CO
Employer

APPEAL NO. 14A-UI-12319-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/02/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Crystal Garner filed a timely appeal from the November 21, 2014, reference 01, decision that disqualified her for benefits. After due notice was issued, a hearing was held on December 17, 2014. Ms. Garner participated. Karin Riiska of Barnett Associates, Inc., represented the employer and presented testimony through Cari Hannon, Sally Drees and Jason Kleinschmidt.

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: Crystal Garner was employed by Progressive Casualty Insurance Company as a full-time claims adjuster/claims generalist from January 2013 until November 5, 2014, when the employer discharged her for allegedly falsifying records. Ms. Garner's regular work hours were 8:00 a.m. to 5:00 p.m., Monday through Friday. Ms. Garner's immediate supervisor from February 2014 to the end of the employment was Cari Hannon, Claims Supervisor.

As the claims adjustor/claims generalist, Ms. Garner was the first person from Progressive to investigate claims by contacting all interested parties, by taking the statements of the interested parties, by determining whether the matter was covered by the Progressive insurance policy, and by determining whether liability rested with Progressive's insured. The employer expected Ms. Garner to make initial contact with interested parties within two hours of being assigned the claim, if possible. The employer otherwise expected Ms. Garner to make contact with the interested parties within 24 hours of being assigned the case, if possible, and by making daily attempts to contact the interested parties until she was able to speak with the interested parties and take their statements. Such calls were recorded. The employer had the ability to review telephone records to verify whether the calls documented by the claims adjuster/claims generalist had actually taken place. Ms. Hannon would periodically verify the calls the claims adjusters/claims generalists were documenting. Ms. Garner would be assigned up to eight new claims per day. Ms. Garner might have to make 30 or more outbound calls per day and might

have to take 15 or more inbound calls per day. Taking a statement from an interested party might take up to 15 minutes.

The employer's policies and practices required that Ms. Garner accurately document each and every contact or attempt at contact. This requirement was set forth in a written code of conduct that Ms. Garner received and acknowledged in February 2013. The employer emphasized that since the employer's records constituted discoverable evidence in legal disputes, "accurate, fair, complete, timely and understandable" documentation was essential. The employer had a zero-tolerance policy regarding falsification of business records.

On October 29, 2014, Ms. Hannon did her periodic verification of Ms. Garner's documented calls. In claim number 14-3651603, Ms. Garner had documented making a call to the claimant driver at 4:52 p.m. Eastern time. Ms. Garner documented that she had left a voicemail message for the claimant driver. When Ms. Hannon cross-checked that documentation with the employer's telephone records, Ms. Hannon did not find a call made by Ms. Garner at that time. Ms. Garner documented another call to the claimant driver on the morning of October 29. Ms. Hannon was able to verify that call.

Ms. Hannon considered two more purported calls when drawing her conclusion that Ms. Garner had falsified documentation. The next most recent call was from October 10, 2014 at 1:56 p.m. Eastern time and concerned claim number 14-4148501. Ms. Garner had documented a telephone call at that time to a claimant owner driver and documented that she had left a message for the party to call her back. Ms. Garner had made other calls to the claimant owner driver that Ms. Hannon was able to verify. However, Ms. Hannon's cross-check with the employer's telephone records did not indicate a telephone call at that time. The third call that Ms. Hannon considered was from September 16, 2014 at 5:49 p.m. Eastern time regarding claim number 14-3342816. Ms. Garner documented calls to the claimant driver on September 11, 12, 15, 16 and 17. Regarding the call documented on September 16, Ms. Garner had documented that she left a message for the claimant driver to call back. When Ms. Hannon cross-checked Ms. Garner's documentation against the employer's phone records, Ms. Hannon verified that all but the call on September 16 were reflected in the employer's phone records.

On October 30, Ms. Hannon met with Ms. Garner to discuss the three calls that Ms. Hannon was unable to verify with the employer's phone records. Ms. Garner asserted that if she had documented calls, then she believed she had made the calls. Ms. Garner indicated that it was possible that that she might have documented a call on a wrong claim as a result of human error.

The employer's human resources department believed there to be two additional unverifiable calls. One of those calls turns out to be a duplicate of the October 28 call. The other called was on August 22, 2014 at 9:36 a.m. Ms. Hannon was not involved in the human resources department's investigation of the two purported additional calls.

Ms. Garner had not received any prior reprimands for erroneous or false documentation of phone calls. Ms. Garner had no financial incentive for falsifying call records. Jason Kleinschmidt, Human Resources Consultant, is aware of other employees having falsified records to avoid performing assigned work in the required timeframe. However, Mr. Kleinschmidt does not assign that motive to Ms. Garner.

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 weight of the evidence in the record fails to establish misconduct in connection with the employment. It is entirely possible that Ms. Hannon's review of the phone records to verify calls was flawed with regard to the final call or any earlier call. The employer's verification process was not error-proof. Ms. Hannon and Mr. Kleinschmidt initially asserted there were *five* calls that the employer took into consideration. The employer retracted that assertion when it became apparent that the employer had double-counted the October 28, 2014 call in claim number 14-3651603. It is also entirely possible, given the number of cases assigned to Ms. Garner and the volume of calls she handled each day, that Ms. Garner occasionally made an error in documenting calls. The employer has failed to present sufficient evidence to establish problem calls beyond the three that Ms. Hannon referenced during her testimony. The weight of the evidence indicates that if there was erroneous information documented by Ms. Garner regarding the problem calls on September 16, October 10, and October 28, 2014, the issues resulted from human error or carelessness, not from any intent on the part of Ms. Garner to falsify records or mislead the employer. The incidents in question were insufficient to establish a pattern indicating a willful or wanton disregard of the employer's interests.

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

DECISION:

The November 21, 2014, reference 01, 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/css