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

SARA K KUHNS
Claimant

NORWALK COMMUNITY SCHOOL DIST
Employer

APPEAL NO. 15A-UI-02789-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/15/15
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) - Discharge
871 IAC 24.32(8) - Current Act Requirement

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 27, 2015, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on February 12, 2015 for no disqualifying reason. After due notice was issued, a hearing was commenced on April 8, 2015 and concluded on April 21, 2015. Claimant Sara Kuhns participated personally and was represented by Attorney Tyler Johnston, who presented testimony through Ms. Kuhns and Ryan Ramsvig. Kate Baldwin represented the employer and presented additional testimony through Jill Anderson, Sheila Taylor and Shawna Neifert. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Two and Four into evidence. The administrative law judge took official notice of the fact-finding materials.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid benefits.

Whether the claimant is required to repay benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed by Norwalk Community School District as a substitute teacher and last performed work for the employer on December 15, 2014. After the claimant performed work that day, a paraprofessional who had been present in the classroom on December 15 alleged to the employer that the claimant had fallen asleep in the classroom. The employer waited until January 20, 2015 to raise the issue with the claimant and only did so after the claimant inquired

as to why she was no longer being asked to substitute teach. Claimant's immediate supervisor when she was substitute teaching was the principal of the school in which she was teaching. In January, when the employer broached the topic of the December 15 alleged sleeping incident, the employer also raised concerns about prior conduct that had earlier come to the attention of the principals who had supervised the claimant's work.

Claimant established claim for benefits it was effective February 15, 2015 and received benefits. The employer participated in the fact-finding interview.

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 evidence in the record fails to establish a current act upon which a disqualification for benefits might be based. See 871 IAC 24.32(8). The final incident that triggered the employer's decision to no longer utilize the claimant as a substitute teacher occurred on December 15, 2014 and came to the employer's attention no more than a day after the alleged conduct. The employer elected not to say anything to the claimant at that time and elected instead simply not to use the claimant's services again. It was more than a month after the alleged final incident that the employer broached the subject with the claimant and did so at that time only because the claimant inquired as to why she was no longer being asked to substitute teach. The employer's delay in discussing the alleged misconduct with the claimant was unreasonable. All of the other alleged conduct that factored into the employer's decision to no longer use the claimant's services occurred prior to the final incident and came to the attention of the supervising principals before the final incident.

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

DECISION:

The February 27, 2015, reference 01, decision is affirmed. The discharge was not based on a current act. 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.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/css