IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

NICHOLE J KUTZMAN
Claimant

VON MAUR INC
Employer

APPEAL NO. 11O-UI-14928-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/26/11
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

This matter was before the administrative law judge upon an Employment Appeal Board remand based on a defective digital recording of a previous appeal hearing. The employer had filed a timely appeal from the July 20, 2011, reference 01, decision that allowed benefits. After due notice was issued, a new hearing was held on December 19, 2011. Claimant Nichole Kutzman participated. Carrie Menke, assistant director of human resources, represented the employer. Exhibits 1 through 10 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: Nichole Kutzman was employed by Von Maur as a full-time New Accounts Associate from 2007 until June 28, 2011, when Carrie Menke, assistant director of human resources, and Carrie Mock, new accounts manager, discharged her from the employment based on the employer's code of conduct policy. On June 11, 2011, Ms. Kutzman purchased two pairs of shoes from the employer's Southpark store in Moline. Twelve days later, on June 23, Ms. Kutzman returned one of the pairs of shoes to the same location. Ms. Kutzman had wanted to return the shoes for a different size, but the store did not have the shoes in a different size. The retail price of the shoes was $17.00. The cost to Ms. Kutzman, with her employee discount, had been $13.60 before sales tax.

The employer has a written code of conduct policy. Included in the list of conduct that could subject an employee to discipline up to discharge was the following: "Violating the Employer Merchandise Return Policy – returning merchandise that is old or not in sellable condition or abusing Price Adjustment Policy." Ms. Kutzman had signed her acknowledgment of the Code of Conduct policy at the time of hire. The employer revised the Employee Merchandise Return Guidelines in January 2011, with the changes to be effective February 1, 2011. Ms. Kutzman

signed her acknowledgement of the guidelines on January 27, 2011. The guidelines stated, in relevant part, as follows:

> Employee merchandise return guidelines:
>
> 1. A receipt must be present for all employee returns.
> 2. Employee returns must be made within six months of the original purchase date.
> 3. Merchandise must be unworn, unwashed, and the tags must be attached.
> 4. If purchased merchandise is found to have a manufacturer's defect, the item(s) can be returned or exchanged.
>
> All employee returns that do not meet these criteria will be denied. The employee returning the merchandise and the employee processing the return will be held responsible for complying with these guidelines. Any employee returns that fall outside of these standards and is processed through the register will be considered a violation of the code of conduct and may result in disciplinary action, up to and including termination.

There is some dispute between the parties regarding the condition of the shoes Ms. Kutzman returned. The employer provided a black and white photocopy of the bottom of the shoes as an exhibit for the hearing. The returned shoes each bore the show size sticker on the sole. The right show bore the remnant of the price sticker, but the price information was worn off. Each shoe indicated some wear in the material adjacent to the rubber sole. Ms. Kutzman had tried the shoes on inside her home and had walked in them in her home long enough to determine that the shoes were too large, were slipping, and that she needed a smaller size.

When Ms. Kutzman returned the shoes to the Southpark store, she was uncertain whether the condition of the shoes complied with the return requirements and left that to the discretion of the clerk who assisted her with the return. The clerk gave no indication that the shoes did not comply. Though the employer has video surveillance in the store, and though Ms. Kutzman requested a copy of surveillance documenting the return of the shoes, the employer did not provide a copy of the surveillance record to Ms. Kutzman. Ms. Kutzman returned the shoes at 5:30 p.m. At 6:03 p.m., store personnel documented the shoes as being damaged due to having been worn.

When Ms. Menke and Ms. Mock interviewed Ms. Kutzman about the return of the shoes, Ms. Kutzman explained that she had wanted to exchange the shoes because they did not fit correctly and that she had walked around once in her home. The employer found it difficult to believe that the shoes would show the degree of wear if circumstances had been as Ms. Kutzman described. After interviewing Ms. Kutzman, the employer moved forward with discharging from the employment. The return of the shoes was the sole basis for the decision to discharge Ms. Kutzman from the employment.

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).

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. Ms. Kutzman had no intention to run afoul of the employer's merchandise return policy or code of conduct when she returned the shoes on June 23, 2011. The employer has failed to present sufficient evidence and sufficiently direct and satisfactory evidence to indicate otherwise. The employer has failed to present sufficient evidence to rebut Ms. Kutzman's assertion that she wore the shoes but once at home and only long enough to determine they did

not fit. The employer had the ability to present testimony from the clerk who processed the return, but elected not to present such testimony. The employer apparently had the ability to document the transaction through video surveillance, but has made no such record available to the claimant or to the administrative law judge. Ms. Kutzman had worked for the employer for four years without similar incident. Rather than establishing intent to mislead the employer or to violate policy, the weight of the evidence indicates instead an isolated good-faith error in judgment on the part of Ms. Kutzman.

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

DECISION:

The Agency representative's July 20, 2011, 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.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/kjw