

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TAMMY J HINTZ
Claimant

APPEAL NO. 17A-UI-04958-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LONGBRANCH INC
Employer

OC: 04/16/17
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 8, 2017, 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 for no disqualifying reason. After due notice was issued, a hearing was held on May 26, 2017. Claimant Tammy Hintz did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Douglas De Long, Chief Financial Officer, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits A through G into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance 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: Tammy Hintz was employed by Longbranch, Inc., d/b/a Best Western Longbranch in Cedar Rapids, as a part-time housekeeper from May 2016 until April 15, 2017, when Danielle Daniels, head housekeeper, discharged her from the employment. The final incident that triggered the discharge occurred on April 15, 2017, when Ms. Daniels discovered Ms. Hintz watching a Youtube video at a time when Ms. Hintz was supposed to be cleaning guest rooms. When Ms. Daniels entered the room, Ms. Hintz looked up from her cell phone and told Ms. Daniels that she was watching a video of a giraffe being born. Ms. Hintz was behind on her cleaning duties at the time. The employer's written policies prohibited Ms. Hintz from using her cell phone outside scheduled break times. The policy was set forth in the employee handbook the employer provided to Ms. Hintz at the start of her employment. There were no prior reprimands for violation of the cell phone policy or for substandard work.

In making the decision to discharge Ms. Hintz from the employment, the employer also considered prior reprimands that the employer had issued to Ms. Hintz for attendance. The most recent such reprimand was issued to Ms. Hintz on March 6, 2017. Additional reprimands for attendance had been issued to Ms. Hintz on November 20 and December 12, 2016.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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 establishes a violation of the employer’s cell phone policy on April 15 and a contemporaneous incident of neglect of duties. The evidence does not establish any prior similar incidents. The incident on April 15, 2017 demonstrated extremely poor judgment on the part of Ms. Hintz. In the absence of prior similar conduct, the evidence fails to establish conduct that rises to the level of substantial misconduct in connection with the employment sufficient to disqualify Ms. Hintz for unemployment insurance benefits. The attendance concerns do not rise above the level of allegations and concern old conduct, rather than recent or current conduct. The administrative law judge notes that the employer elected to present only hearsay evidence and elected not to present testimony from Ms. Daniels.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Hintz was discharged on April 15, 2017 for no disqualifying reason. Accordingly, Ms. Hintz is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged for benefits.

DECISION:

The May 8, 2017, reference 01, decision is affirmed. The claimant was discharged on April 15, 2017 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/rvs