IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

GUY B STOWE
Claimant

REBITRZER'S BAR & GRILL LLC
Employer

APPEAL NO. 14A-UI-11112-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/05/14
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 21, 2014, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant's October 6, 2014 discharge was not based on a current act. After due notice was issued, a hearing was held on November 14, 2014. Claimant Guy Stowe participated. Mike Rebitrzer represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials and marked one page of those materials as Department Exhibit D-1 for identification purposes.

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: The employer owns and operates Rebitrzer's Bar & Grill, LLC. d/b/a Bier Stube Bar and Grill in LeClaire. Guy Stowe was employed at Bier Stube as a full-time cook until October 8, 2014, when Mike Rebitrzer, General Manager, discharged him from the employment. Two incidents factored in the employers decision to discharge Mr. Stowe from the employment. The earlier incident occurred on September 29, 2014. On that day, Amy Behnke, Bier Stube Store Manager, asked Mr. Stowe to run to a local store for need restaurant supplies. The restaurant needed sauerkraut. Ms. Behnke gave Mr. Stowe $40.00 in cash to pay for the needed items. Mr. Stowe used his personal vehicle to drive the roughly quarter mile to Slagle's Grocery, where he purchased $33.08 worth of sauerkraut. Mr. Stowe received $6.92 in change. Mr. Stowe then drove a mile out of the way to a BP station, where he purchased $6.92 in gas for his personal vehicle. There was a Shell gas station located very near to Slagle's Grocery, but Mr. Stowe elected not to purchase gas there. Mr. Stowe then drove a mile back to the restaurant. Mr. Stowe provided Ms. Behnke with the receipt for the food purchase and the

receipt for the gasoline purchase. Mr. Stowe did not provide the employer with any change, as he had used all of the employer's $40.00. Ms. Behnke had not authorized the gas purchase. Shortly after Mr. Stowe returned to the restaurant, Ms. Behnke telephoned Mike Rebitrzer to report Mr. Stowe's conversion of the $6.92 in change from the food purchase to a gasoline purchase for his personal vehicle. Ms. Behnke told Mr. Rebitrzer, "You won't believe the audacity of this person." The employer did not speak further to Mr. Stowe until October 8, 2014, at the time of the discharge. Mr. Stowe felt justified in using the employer's change from the purchase for gas in his car because he had previously gone on other grocery runs in his personal vehicle to Slagle's grocery without being compensated for use of his vehicle and because he had previously used his personal vehicle to transport restaurant items to the Holiday Inn Express that was near Bier Stube. On September 29, Mr. Stowe had arrived at work with no money and insufficient gas in his car to get him home. Mr. Stowe lived 35 miles from the workplace.

The more recent incident that factored in the discharge occurred on October 4, 2014, when Mr. Stowe got into an argument with another kitchen staff member after the other employee volunteered Mr. Stowe to assist the business owner in unloading a freight truck.

Mr. Stowe established a claim for unemployment insurance benefits that was effective October 5, 2014. Mr. Stowe received $462.00 in benefits for the three-week period of October 5, 2014 through October 25, 2014.

The employer was available for but was denied the opportunity to participate in the fact-finding interview because the claims deputy used a fax number to attempt to reach the employer, rather than the telephone number the employer had provided for the fact-finding interview.

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 employer has presented insufficient evidence to establish misconduct in connection with the October 4, 2014 conflict between Mr. Stowe and the coworker. Mike Rebitrzer was not present for the incident. The employer did not present any testimony from those who were present for the incident. The employer had the ability to present such testimony. Mr. Stowe asserts that he did not instigate the conflict and that it was the other employee who escalated the matter to a heated exchange. The employer has presented insufficient evidence to rebut Mr. Stowe's testimony regarding that incident.

The conversion of the employer's change from the authorized food purchase to the unauthorized gasoline purchase occurred on September 29, 2014 and came to the employer's attention that same day. The employer did not take any action on the matter until October 8, 2014, nine days later. The weight of the evidence indicates that the employer elected not to take any action on that matter at the time it came to the employer's attention, but decided to revisit the matter after the October 4 argument with the coworker. Given the employer's decision to defer disciplinary action on the September 29, 2014 matter, the administrative law judge concludes that the September 29, 2014 no longer constituted a current act of misconduct at the time of the October 8 discharge and, therefore, that it cannot serve as a basis for disqualifying the claimant for unemployment insurance benefits. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The claims deputy's October 21, 2014, reference 01, decision is affirmed. The discharge was not based on a current act of misconduct. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/pjs