IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LEE G NADING
Claimant

FAREWAY STORES INC
Employer

APPEAL NO. 09A-UI-10862-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/28/09
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 July 24, 2009, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on August 13, 2009. Claimant Lee Nading did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Garrett Picklapp, General Counsel, represented the employer and presented testimony through Sean Versluis, Store Market Manager. Exhibits One, Two, Three and A 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.

Whether the discharge was based on a current act of misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lee Nading was employed by the Fareway Store in Waukon as a part-time meat clerk from April 28, 2009 until June 22, 2009, when Sean Versluis, Market Manager, and Jeff Sterns, Vice President for the Eastern Region, discharged him. Mr. Versluis was Mr. Nading's immediate supervisor.

The final incident that triggered the discharge occurred on June 10, 2009. On that day Mr. Nading was using the employer's mechanical slicer and suffered an injury to his hand. There were no other witnesses to the incident. Mr. Nading and another meat clerk were the only people working in the meat department at the time and the other clerk was in a backroom. Mr. Nading summoned the other clerk for assistance. The other clerk telephoned Mr. Versluis, who responded to the store. Mr. Versluis transported Mr. Nading to the hospital. Mr. Nading was discharged a few hours later. Even though there had been no witnesses to the incident, Mr. Versluis concluded that the only way Mr. Nading could have suffered injury was if he had failed to adhere to instructions Mr. Versluis had given him regarding safe operation of the slicer.

On June 11, 2009, Mr. Versluis prepared a written reprimand to issue to Mr. Nading. Mr. Versluis had previously reduced Mr. Nading's work hours to five per week due to attendance and other prior issues in the employment. Mr. Nading was next scheduled to work on June 19, 2009. The employer had no reason to believe that Mr. Nading was unavailable between June 10 and June 19.

On June 17, Mr. Versluis spoke with his supervisor, Jeff Sterns, Vice President of the Eastern Region. The two decided to discharge Mr. Nading from the employment.

On June 18 through, Mr. Versluis was off work pursuant to a planned vacation. Mr. Versluis had a new assistant market manager and did not want to delegate the task of discharging Mr. Nading.

Mr. Nading appeared for and worked his shift on June 19, 2009. At that time, the Assistant Market Manager or some other supervisor presented Mr. Nading with the reprimand Mr. Versluis had drafted and signed on June 11, 2009. The person who presented the reprimand to Mr. Nading did not mention anything about discharge from the employment as a disciplinary action being contemplated by the employer. Mr. Nading signed the written reprimand no June 19, 2009.

On June 22, 2009, Mr. Versluis notified Mr. Nading that he was discharged from the employment. This was the first time Mr. Versluis, or anyone else with supervisory responsibility for Mr. Nading's employment, had mentioned to Mr. Nading that the June 10 incident could serve as a potential basis for discharging him from the employment.

In making the decision to discharge Mr. Nading from the employment, Mr. Versluis also considered a May 8, 2009 incident wherein Mr. Nading had cut himself while washing knives. While there had no witnesses to that incident, Mr. Versluis had concluded that the only way Mr. Nading could have suffered injury was if he had failed to adhere to instructions Mr. Versluis had given him regarding the safe method to wash knives.

In making the decision to discharge Mr. Nading, Mr. Versluis also considered prior attendance issues. The most recent such incident occurred on June 10, when he Mr. Nading arrived at the workplace on time, but did not actually start working until after the scheduled start of his shift.

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 evidence in the record fails to establish a current act of misconduct. The evidence indicates that the incidents that prompted the discharge--the slicer incident, the tardiness matter, or the heated exchange--occurred on June 10 and came to Mr. Versluis' attention on that day. The evidence indicates that the employer did not notify Mr. Nading until June 22, 2009 that the June 10 incident(s) could serve as a possible, or actual, basis for discharging him from the employment. The weight of the evidence fails to establish that Mr. Nading was unavailable to the employer for any part of the period between June 10 and June 22. The fact that the employer did not decide until June 17 to discharge Mr. Nading from the employment, instead of imposing a lesser discipline, did not relieve the employer of the obligation to provide timely notice to Mr. Nading that discharge from the employment was one possible discipline being considered by the employer. Mr. Versluis' planned vacation would not provide good cause for delaying notice to Mr. Nading concerning the potential for discharge from the employment in connection with the June 10 incident. Nor would the presence of a new Assistant Market

Manager provide good cause for delaying notice to Mr. Nading; the evidence indicates that the employer had other options.

In the absence of a current act of misconduct, the administrative law judge concludes that Mr. Nading was discharged for no disqualifying reason. In the absence of a current act, the administrative law judge need not rule on whether the incidents of June 10 constituted misconduct and need not consider the past acts that factored into the discharge. Mr. Nading is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Nading.

DECISION:

The Agency representative's July 24, 2009, reference 03, decision is affirmed. 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

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Decision Dated and Mailed

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