

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BEVERLY A PEDERSON
Claimant

APPEAL NO. 08A-UI-05204-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CONCORD PAYROLL INC
Employer

**OC: 04/20/08 R: 02
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Beverly Pederson filed a timely appeal from the May 22, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 16, 2008. Ms. Pederson participated. Violet Hildreth, Human Resources Manager, represented the employer and presented additional testimony from Abid Talic, General Manager of the West Des Moines Fairfield Inn & Suites.

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: Beverly Pederson was employed by Concord Payroll, Inc., as a full-time front desk clerk at the West Des Moines Fairfield Inn & Suites. The employment commenced on November 14, 2001 and ended on April 17, 2008, when General Manager Abid Talic discharged Ms. Pederson.

The events that led up to the final incident were as follows. On April 4, 2008, Ms. Pederson checked in a family that was in town for a funeral. Two sisters wanted to pay cash for a room and split the cost. Ms. Pederson told the sisters that they could pay cash for the room, but would need to provide an additional \$100.00 deposit to cover any incidental expenses related to their stay. Ms. Pederson told the sisters they could also choose to secure the room and/or pay for the room with a credit card. The sisters elected to pay with a credit card.

On or about April 9, one of the sisters telephoned the hotel to complain that she had been double billed for her room. The guest asserted she had paid cash for the room and had also received a credit card charge. General Manager Abid Talic took the call from the guest. A recently hired clerk told Ms. Pederson that a guest had called to complain and that he thought Ms. Pederson was in trouble. Ms. Pederson contacted Mr. Talic and asked about the complaint. Mr. Talic did not speak with Ms. Pederson at the time, except to tell her the name of the guest. Ms. Pederson looked up the records regarding the guest's stay. The record reflected a credit card transaction and did not reflect a cash transaction. Ms. Pederson printed out the "folio" record and slipped it under Mr. Talic's office door.

On April 10, Ms. Pederson took it upon herself to call the guest. Ms. Pederson asked the guest whether she remembered Ms. Pederson waiting on her. Ms. Pederson then walked the guest through the steps of the transaction. Ms. Pederson concluded by reminding the guest that the guest and her sister had ultimately decided not to pay with cash. After Ms. Pederson's call, the guest contacted Mr. Talic to complain about the call from Ms. Pederson. The guest also provided a written statement. Ms. Pederson knew at the time she made that call that Mr. Talic was already aware of the matter. Ms. Pederson also knew that the established guest complaint procedure called for General Manager Talic, not Ms. Pederson, to follow up with the customer.

On April 11, Mr. Talic met with Ms. Pederson for the purpose of discussing the events between April 4 and 10 and to issue reprimands concerning those events. Mr. Talic issued a "coaching and counseling" that directed Ms. Pederson to cease borrowing funds from other staff. Ms. Pederson had most recently borrowed \$50.00 from Mr. Talic on April 4 and had paid Mr. Talic back on April 11. Mr. Talic issued a verbal warning to Ms. Pederson regarding the employer's cash handling policies. Mr. Talic did not accuse Ms. Pederson of theft in connection with the April 4 guest transaction, but wanted to make certain that Ms. Pederson understood the employer's expectations regarding the handling of cash. Mr. Talic issued Ms. Pederson a written warning for contacting the guest to discuss the matter. Ms. Pederson asked Mr. Talic to hear her explanation of the April 4 incident and explained what had happened from her perspective. Mr. Talic asked Ms. Pederson whether she would be willing to review the surveillance records with him and Ms. Pederson indicated she would be willing to do that. Mr. Talic indicated that he did not have time to do it right then. After the counseling session, Ms. Pederson continued to be disturbed by the idea that the employer might suspect her of theft.

The final incident that actually prompted the discharge occurred on April 17. Ms. Pederson was scheduled to work at 7:00 a.m. Ms. Pederson contacted the night auditor before the scheduled start of her shift and asked the night auditor to "rewind" the surveillance records back to 3:15 p.m. on April 4 so that she could review the surveillance records. The night auditor complied with Ms. Pederson's request. The surveillance records were actually recorded on a computer hard drive, as opposed to being recorded on a tape, CD or DVD. Neither Ms. Pederson nor the night auditor was authorized to operate the surveillance equipment. When Ms. Pederson arrived for work, she and the night auditor reviewed the video surveillance record concerning her transaction with the complaining guest. Ms. Pederson did not touch or operate the surveillance equipment. Ms. Pederson concluded the surveillance records exonerated her. The night auditor continues in her employment, but did not testify at the appeal hearing.

When Mr. Talic arrived for work on April 17, Ms. Pederson told Mr. Talic that she had had the night auditor "rewind" the surveillance records to the April 4 transaction and asked Mr. Talic to review the surveillance record with her. Ms. Pederson asked Mr. Talic to push the "play" button and the two reviewed the surveillance records. After Mr. Talic reviewed the surveillance record with Ms. Pederson, he said, "This changes things, I'll have to get a hold of Vi." "Vi" was Violet Hildreth, Human Resources Manager.

A short while later, Ms. Pederson observed Mr. Talic "rewinding" the surveillance record. At some point in reviewing the surveillance record, Mr. Talic had observed that approximately two minutes of surveillance material was missing from the record. Mr. Talic could tell that the material was missing because the date and time appeared on the video monitor. The two-minute gap occurred just as the guests placed their money on the counter. Mr. Talic called Ms. Pederson back and had her review the portion of the surveillance that reflected the two-minute gap in the record. Ms. Pederson denied any knowledge regarding the missing portion and denied that she had anything to do with the portion being edited or deleted. Ms. Pederson then asked Mr. Talic if he had called Ms. Hildreth. Mr. Talic indicated that he would make the call later. Ms. Pederson then insisted that Mr. Talic call Ms. Hildreth. When Mr. Talic declined to make the call at that moment, Ms. Pederson indicated that she was going to make the call herself.

Later on April 17, Ms. Hildreth went to the workplace and notified Ms. Pederson that she was being discharged for misuse of company equipment. The equipment in question was the surveillance equipment.

Later in the day, Ms. Hildreth appeared at the West Des Moines Fairfield Inn & Suites for the purpose of discharging Ms. Pederson from the employment. Ms. Hildreth told Ms. Pederson that she was being discharged for misuse of company equipment.

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 administrative law judge notes that the employer has not provided a copy of the surveillance record for the hearing, though Mr. Talic testified that the material has since been copied to a DVD. The administrative law judge also notes that neither party presented testimony from the night auditor, who admitted to handling the surveillance equipment. Though the employer had reasonable concerns about Ms. Pederson's conduct, the evidence in the record fails to establish, by a preponderance of the evidence, misconduct in connection with the employment that would disqualify Ms. Pederson from receiving unemployment insurance benefits. The weight of the evidence in the record does not support a conclusion that Ms. Pederson deleted surveillance material or that she asked someone else to delete surveillance material. Ms. Pederson's request that the night auditor "rewind" the surveillance record to the April 4 incident indicates poor judgment on Ms. Pederson's part, but does not indicate either an intent to interfere with an investigation or an intentional violation of a company rule. The evidence indicates that there was in fact no investigation being conducted at the time Ms. Pederson brought the matter back to the attention of the employer on April 17. The weight of the evidence indicates that Ms. Pederson's conduct was motivated by a perhaps overzealous and misguided desire to clear her name, rather than an intent to go against the interests of the employer.

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

DECISION:

The Agency representative's May 22, 2008, reference 01, decision is reversed. 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