

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**CHARLA M PUCCIO**  
Claimant

**APPEAL NO. 18A-UI-02054-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ABM INDUSTRY GROUPS LLC**  
Employer

**OC: 01/07/18**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Charla Puccio filed a timely appeal from the February 9, 2018, reference 04, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Puccio was discharged on January 9, 2018 for violation of a known company rule. After due notice was issued, a hearing was held on March 12, 2018. Ms. Puccio participated. Malia Maples of Employers Edge represented the employer and presented testimony through Christine Wetzler and Bob Burr. Exhibits 1 through 6 were received into evidence.

**ISSUE:**

Whether Ms. Puccio was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Charla Puccio was employed by ABM Industry Groups, L.L.C. as a full-time general cleaner during two distinct periods separated by a three-month gap. Ms. Puccio's separation from the most recent period of employment is the focus of this decision. Ms. Puccio began that second period of employment in January 2017. Ms. Puccio and six other ABM general cleaners were assigned to an Emerson/Fisher Controls business building on South 1st Avenue in Marshalltown. Ms. Puccio and her daughter, Kim Calloway, were the only two female ABM employees on the cleaning crew and were paired as a cleaning team. Ms. Puccio's and Ms. Calloway's primary duties included dusting in offices and cubicles. ABM work rules prohibited ABM employees from touching personal property belonging to Emerson/Fisher employees. The primary duties of the other cleaning crew members were focused on areas of the building other than those assigned to Ms. Puccio and Ms. Calloway. The work hours were 5:00 p.m. to 1:00 a.m., Monday through Friday. In other words, the cleaning duties were performed after Emerson/Fisher Controls employees had gone home for the day. Lead Cleaner Matt Brewer supervised the crew. Mr. Brewer would temporarily reassign cleaning crew members as needed. Mr. Brewer reported to Bob Burr, District Manager. Mr. Burr was familiar with Ms. Puccio and her daughter and had workplace contact with each on multiple occasions.

On Thursday, January 4, 2018, Mr. Burr returned to work after a period of vacation and was summoned to a meeting by Chip Uhde, Emerson/Fisher Controls Facilities Manager. Mr. Uhde told Mr. Burr that he needed Mr. Burr to view a video that showed ABM employees committing theft from the premises. Mr. Uhde told Mr. Burr that an Emerson/Fisher Controls employee suspected ABM cleaners had been taking items from his office and had set up a motion-activated video camera to surveil after-hours activities in his office. Mr. Uhde told Mr. Burr that the Emerson/Fisher Controls employee had also placed two dollar bills on his desk as bait. The 20-minute video recording was from December 21, 2017. The Emerson/Fisher Controls employee brought the video content to the attention of Mr. Uhde. As Mr. Burr watched the video, he recognized Ms. Puccio and Ms. Calloway as the people depicted on the video. The video showed that Ms. Puccio was the person who spent the most time in the office, while Ms. Calloway was in and out of the office multiple times. The video showed Ms. Puccio rummaging through the Emerson/Fisher Controls employee's desk by opening and looking through drawers. Ms. Puccio would have no legitimate reason and no authorization to access the employee's desk drawers. The video also showed Ms. Puccio and Ms. Calloway next to the desk, near where the bait money had been placed. The video showed Ms. Puccio and Ms. Calloway placing something in their pockets, the money from atop the desk, which money was subsequently missing from the desk. Mr. Burr asked Mr. Uhde for a copy of the video. Mr. Uhde declined to provide a copy of the video. Mr. Uhde told Mr. Burr that he was not comfortable with providing a copy of the video and referenced an Emerson/Fisher Controls work rule that prohibited employees from video-recording in the workplace. Mr. Uhde told Mr. Burr that he did not want the two ABM employees to return to the premises.

Following the January 4 meeting with Mr. Uhde, Mr. Burr had Mr. Brewer summon Ms. Puccio. Mr. Burr told Ms. Puccio that he had just met with Mr. Uhde and that Ms. Puccio was suspended for three days pending further investigation of rummaging through desk drawers and taking personal property. Mr. Burr had Ms. Puccio sign a document that suspended her from the employment. Mr. Burr directed Ms. Puccio to return at 3:00 p.m. on January 9, 2018.

When Ms. Puccio and Ms. Calloway reported to the workplace on January 9, 2018, they learned that their security badges were no longer available. A security officer summoned Mr. Brewer, who escorted the pair to meet with Mr. Burr. Mr. Burr met with Ms. Calloway first and then met with Ms. Puccio. Mr. Burr presented Ms. Puccio with a corrective action that discharged her from the employment for rummaging through a desk and taking personal property on December 21, 2017. Mr. Burr told Ms. Puccio that the incident was captured on video and described how the Emerson/Fisher employee had set up the camera and the bait money. Mr. Burr told Ms. Puccio that the camera had been a "really good camera" and that the video "was not grainy." Ms. Puccio requested to see the video. Mr. Burr said no, that it was Fisher property. Ms. Puccio asked the location of the office in question. Mr. Burr initially said the office was on the south side of the building, which was not Ms. Puccio's area. When Ms. Puccio asked again about the location of the office, Mr. Burr gestured toward the west side of the building, to Ms. Puccio's assigned area. Ms. Puccio asked the name of the Fisher employee, but Mr. Burr did not know the name of the employee. Ms. Puccio asserted that Mr. Brewer had sent other employees into her work area, to which Mr. Burr responded, "I'm not blind" and that it had been Ms. Puccio and Ms. Calloway on the video. Mr. Burr asked Ms. Puccio to sign the discharge document, but Ms. Puccio walked out of the meeting instead.

The employer's written work rules prohibit theft of any kind from the client's premises and state that such conduct will be grounds for immediate termination of the employment. Ms. Puccio was aware of the work rule. The employer provided Ms. Puccio with a hardcopy of the work rules in August 2016, at the start of Ms. Puccio's first period of employment. At the time

Ms. Puccio started the most recent period of employment in January 2017, the employer had Ms. Puccio electronically acknowledge the same work rules.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The weight of the evidence in the record establishes that Ms. Puccio was discharged for misconduct in connection with the employment, based on the December 21, 2017 conduct that included rummaging through an Emerson/Fisher Controls employee's desk and taking money from atop that desk. The weight of the evidence in the record establishes good cause for the employer not presenting the video recording of the December 21 conduct as part of the employer's evidence at the hearing. The failure to present such evidence was attributable to the Emerson/Fisher Controls Facility Manager's refusal to provide ABM with a copy of the video. While ABM could have requested a subpoena to compel Emerson/Fisher Controls or its employee to provide a copy of the video for the hearing, a reasonable person can understand why ABM would not want to further strain its relationship with Emerson/Fisher Controls by taking such steps. The evidence indicates that Mr. Burr reviewed the video and that he readily identified Ms. Puccio and Ms. Calloway as the people depicted on the video. The weight of the evidence establishes that the video depicted Ms. Puccio rummaging through the desk and Ms. Puccio and Ms. Calloway placing the money from atop the desk in their pockets. The evidence provides no reason for Mr. Burr to fabricate any part of his testimony and no reason to conclude that his testimony was less than truthful. The evidence establishes that Mr. Burr was merely performing his regular oversight duties when Mr. Uhde brought the concern to Mr. Burr's attention with an expectation that Mr. Burr would address the matter. ABM had the burden of proving misconduct by a preponderance of the evidence and the employer met that burden. Ms. Puccio did not have a burden of proving that she did not engage in the conduct that factored in the discharge. Ms. Puccio adamantly denied, at the time of discharge and at the appeal hearing, that she had committed theft or rummaged through the desk. However, other factors undercut that assertion. Ms. Puccio undercut her credibility by withholding, until cross examination by the employer's representative, that Ms. Calloway was her daughter. At one point during the hearing, Ms. Puccio shifted from asserting her innocence to asserting that she should get unemployment insurance benefits because her daughter did. Ms. Puccio was assigned to the work area in question and therefore had opportunity to rummage through the desk and take the money from the desk. Ms. Puccio and her daughter were the only two female members of the cleaning crew and were the two women engaging in misconduct on the video that Mr. Burr reviewed. That conduct undermined the employer's ability to trust Ms. Puccio and

Emerson/Fisher's ability to trust Ms. Puccio. Trust and trustworthiness were essential in light of the nature of work environment and the fact that Ms. Puccio performed her work duties in the evening when few people were around. Ms. Puccio's conduct demonstrated intentional and substantial disregard of the employer's business interest in maintaining a good, respectful relationship with its client and its business interest in maintaining a workplace free of theft and unauthorized access.

The evidence establishes that the discharge was based on a "current act" of misconduct. The conduct that triggered the discharge came to the employer's attention on January 4, 2018. The employer immediately suspended Ms. Puccio from the employment and discharged her five days later. There was not unreasonable delay on the part of the employer.

Because the administrative law judge concludes that Ms. Puccio was discharged for misconduct in connection with the employment, Ms. Puccio is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Puccio must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

**DECISION:**

The February 9, 2018, reference 04, decision is affirmed. The claimant was discharged on January 9, 2018 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs