

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KRISTAL L MILLER
Claimant

APPEAL NO. 17A-UI-00749-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ADVANCE SERVICES INC
Employer

OC: 12/18/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Kristal Miller filed a timely appeal from the January 12, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Ms. Miller was discharged on December 16, 2016 for misconduct in connection with the employment. After due notice was issued, a hearing was held on February 8, 2017. Ms. Miller participated personally and was represented by attorney Joe Basque. The employer did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate in the hearing. Department Exhibit D-1 was received into evidence.

The appeal hearing went forward as scheduled in the context of the employer's failure to respond to the claimant's discovery request and employer's representation to claimant's attorney that the employer would neither respond to the discovery request nor participate in the appeal hearing.

ISSUE:

Whether Ms. Miller 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: Advance Services, Inc. (ASI) contracts with Pella Corporation to supply ASI employees to work at Pella Corporation. Kristal Miller began her employment with ASI in August 2014. At that time, Ms. Miller began a full-time, long-term assignment at Pella Corporation. Ms. Miller's supervisor at Pella was Christ Loew.

Ms. Miller last performed work in the Pella assignment on Friday, December 16, 2016. On that day, an ASI representative notified Ms. Miller that Pella had ended her assignment. Ms. Miller asked the representative whether ASI had other work for her. The ASI representative told Ms. Miller there was no other work available at that time.

About a month before the assignment ended, Mr. Loew issued a written reprimand to Ms. Miller for purported excessive restroom breaks. At the time, Ms. Miller was dealing with a health issue that necessitated trips to the restroom. Ms. Miller continued to deal with the same illness until she was discharged from the assignment. On December 15, 2016, Ms. Miller left work early due to illness. Ms. Miller notified Mr. Loew of her need to leave work and Mr. Loew approved the early departure. When Ms. Miller returned to work the next day, Mr. Loew told Ms. Miller that the December 15 absence would not be counted against her. However, Mr. Loew told Ms. Miller that her employment was otherwise “under investigation” in light of her restroom breaks. Later that day, Ms. Miller received the news that the assignment was terminated.

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 did not participate in the appeal hearing and did not present any evidence to support the allegation that Ms. Miller's separation from the Pella assignment or from the ASI employment was based on misconduct in connection with the assignment or the employment. The weight of the evidence indicates that the long-term assignment at Pella Corporation was not temporary in nature and that discharge from the assignment was also discharge from the employment. Because Ms. Miller was discharged for no disqualifying reason, she is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

DECISION:

The January 12, 2017, reference 01, decision is reversed. The claimant was discharged on December 16, 2016 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