

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MACK, SHELLY, A
Claimant

APPEAL NO. 13A-UI-02261-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NORTHWEST DIRECT OF IOWA INC
Employer

OC: 10/28/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Shelly Mack filed a timely appeal from the February 18, 2013, reference 03, decision that denied benefits. After due notice was issued, a hearing was held on March 25, 2013. Ms. Mack participated. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing that did not participate. Exhibits A and B were received into evidence.

ISSUE:

Whether Ms. Mack separated from the employment for a reason that would disqualify her for unemployment insurance benefits. The administrative law judge concludes that Ms. Mack was discharged for no disqualifying reason.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Shelly Mack was employed by Northwest Direct of Iowa, Inc., as a full-time telephone sales representative (telemarketer) from March 2012 until January 7, 2013, when Thomas Purinton, Assistant Manager, discharged her from the employment for not generating enough sales to satisfy the employer. Ms. Mack's usual working hours were 8:00 a.m. to 4:30 p.m., Monday through Friday. On January 7, 2013, Mr. Purinton sent Ms. Mack home 30 minutes early because she did not meet the employer's sales expectations that day. It was the employer's practice to send employees home prior to the scheduled end of their shift if they did not meet sales expectations during the shift. On the evening of January 7, 2013, Mr. Purinton telephoned Ms. Mack from his personal cell phone and told her not to return to work. Mr. Purinton told Ms. Mack that the manager, Tanya, was not getting enough sales and that it was not worth paying for Ms. Mack. Ms. Mack pointed out that she had more sales than usual that day. Ms. Mack felt odd about the way Mr. Purinton had contacted her from his personal cell phone after hours. Ms. Mack decided it was best to report for work as usual the next morning. When Ms. Mack arrived, Mr. Purinton asked her what she was doing there. Ms. Mack asked for documentation regarding why she had been discharged. Mr. Purinton said that the employer did not provide such documentation and that he had sent an email to the manager. Mr. Purinton told Ms. Mack that she could call the manager. Mr. Purinton then directed Ms. Mack to leave

the workplace. Ms. Mack left a message for the manager, but never heard back from the employer.

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 employer failed to participate in the appeal hearing and thereby failed to present any evidence to establish either a voluntary quit or a discharge for misconduct in connection with the employment. The evidence in the record establishes that Ms. Mack was discharged because she did not generate sufficient sales to satisfy the employer. The evidence also indicates that Ms. Mack performed her duties in good faith to the best of her ability. Ms. Mack's inability to satisfy the employer's production expectations did not constitute misconduct in connection with the employment. Ms. Mack was discharged for no disqualifying reason. Accordingly, Ms. Mack is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's February 18, 2013, reference 03, 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/css