

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PATRICIA C ELGAS
Claimant

APPEAL NO. 18A-UI-10464-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TUCKER STAFFING LLC
Employer

OC: 09/09/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Patricia Elgas filed a timely appeal from the October 8, 2018, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the deputy's conclusion that Ms. Elgas was discharged on September 12, 2018, for failure to follow instructions in the performance of her job. After due notice was issued, a hearing was started on November 2, 2018 and was concluded on November 9, 2018. Ms. Elgas participated. Jeanne Briggs represented the employer and presented additional testimony through Michael Little. The hearing in this matter was consolidated with the hearing in Appeal Number 18A-UI-10465-JTT. Exhibits 1, 2, 3 and A were received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant (DBRO).

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: Patricia Elgas was employed by Tucker Staffing, L.L.C. d/b/a Actually Clean, as a full-time office assistant from April 2017 until September 12, 2018, when Jason Bailey, President, discharged her from the employment. Fran Ratchford, Sales Manager, communicated the discharge decision to Ms. Elgas. Mr. Bailey was Ms. Elgas' immediate supervisor. Ms. Elgas' assigned work hours were 8:00 a.m. to 5:00 p.m., Monday through Friday. Mr. Bailey frequently required Ms. Elgas to work until 6:00 p.m. or later. Ms. Elgas' duties were outlined in a document the employer provided to her and which Ms. Elgas kept at her desk. The duties were as follows:

1. All answered calls before 2nd ring and emails following script and must have:
 - a. Name
 - b. Address
 - c. Phone
 - d. Desired time

2. Check Tucker website for apps
3. Emails checked every 20 minutes and dealt with
4. All water jobs needing immediate attention or today are to be forwarded immediately and followed up within 10 minutes if not answered and dealt with.
5. In Des Moines, all calls are told first requested date is their appointment, unless called back
6. Des Moines scheduler will respond "ok" if first date is okay or "date" if it is not.
7. Previous day call back job according to script
8. Mail previous day's bills
9. Run background checks
10. Put together bids

Ms. Elgas would answer upwards of 50 calls per day and would respond to 30 to 40 emails per day. Ms. Elgas understood that responding to water extraction requests in a timely manner was a priority duty. Ms. Elgas was supposed to promptly notify Mr. Bailey of all water extraction requests. Ms. Elgas would sometimes get distracted by other duties. Ms. Elgas performed her work duties in an environment made significantly more stressful by Mr. Bailey's aggressive and verbally abusive behavior. Mr. Bailey was prone to shouting, swearing and pounding his fist on his desk. Mr. Bailey's verbally abusive comments included, "I feel like I'm working in a geriatric ward," "I'm working with a bunch of retards," and "I could just bash your teeth in." This comment was directed at another employee within Ms. Elgas' presence. Ms. Elgas is an older person. There was no higher authority in the workplace than Mr. Bailey and, therefore, no meaningful recourse or remedy was available to Ms. Elgas short of quitting the employment.

The final incidents that triggered the discharge occurred on September 10 and 11, 2018. On September 10, 2018, a customer sent an email message requesting water extraction services. The customer subsequently contacted Mr. Bailey and stated that she was unhappy with the response Ms. Elgas had provided. It is unclear whether Ms. Elgas passed along the water extraction request to Mr. Bailey at the time it came in or whether the customer had some other issue with her interaction with Ms. Elgas. When the customer complained, Mr. Bailey spoke to Ms. Elgas and told her such interactions could not happen and that her employment would be terminated if they reoccurred. On September 11, 2018, a different customer sent an email message requesting water extraction. Ms. Elgas sent a response to the customer, but forgot to bring the request to Mr. Bailey's attention. The employer's decision to discharge Ms. Elgas from the employment followed written warnings issued to Ms. Elgas on July 13, 2018 and August 2, 2018 for recent failure to notify Mr. Bailey of water extraction requests. The failure to forward water extraction requests placed the employer at risk of losing the particular service project or the customer's entire business to a competitor.

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).

The weight of the evidence in the record establishes a discharge for no disqualifying reason. The weight of the evidence establishes isolated instances of carelessness, but not a pattern of conduct that would indicate an intentional and substantial disregard of the employer's interests. The weight of the evidence establishes that Ms. Elgas was not the best fit for the particular position and lacked the high organization skills necessary to consistently perform to the employer's expectations. The evidence establishes that Ms. Elgas performed the work duties in good faith and to the best of her ability. Ms. Elgas' inability to consistently perform to the

employer's expectations, especially in the context of the stressful work environment created by the employer, did not rise to the level of misconduct in connection with the employment. Ms. Elgas is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The October 8, 2018, reference 01, decision is reversed. The claimant was discharged on September 12, 2018, 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/scn