

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHELLE M OLSON**  
Claimant

**APPEAL NO. 15A-UI-05186-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BURKE MARKETING CORPORATION**  
Employer

**OC: 04/12/15**  
**Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code Section 96.3(7) – Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the April 22, 2015, reference 01, decision that that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on April 9, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on June 9, 2015. Claimant Michelle Olson participated. Shelly Seibert represented the employer and presented additional testimony through David Gregory. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits A through F into evidence.

**ISSUES:**

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

Whether the employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Michelle Olson was employed Burke Marketing Corporation as a "pack relief" worker from 2007 until April 9, 2015, when the employer discharged her for allegedly falsifying a company record. Ms. Olson's duties involved checking in incoming product, printing labels to put on the product, and making certain that product orders went out to customers in a timely manner. Ms. Olson supervised four to six people in the employer's freshly cooked production area.

The sole incident that triggered the discharge concerned Ms. Olson's fulfillment of a customer's order on February 19, 2015. As part of that process, Ms. Olson was supposed to check the label on the outside of the box of product and then check to make certain that the contents of the box matched that label. In connection with the particular order, Ms. Olson neglected to check the contents on the inside of a particular box. In addition, on documentation Ms. Olson completed in connection with fulfilling the customer's order, she documented a packing date for

contents of the box as November 10, 2014. In other words, Ms. Olson created documentation that indicated she had looked at the contents of the box, had discerned a packing date on the contents of the box, and documented that packing date as November 10, 2014. The contents of the box did not match the label on the label outside the box. The box contained bulk product, not the prepackaged product indicated on the label. There was no packing date on the contents inside the box. When the customer received the product, the customer contacted Burke Marketing Corporation to complain that the customer had received the wrong product. The customer's complaint brought the matter to the employer's attention. The employer witnesses did not know when the product was shipped to the customer, when the customer's complaint was received by Burke Marketing Corporation, or how long the employer was aware of the issue before the employer addressed it with Ms. Olson

In 2013, the employer had issued a written zero-tolerance policy concerning falsification of documentation. Ms. Olson was aware of the policy.

On April 8, 2015, Production Supervisor David Gregory spoke to Ms. Olson about the matter and issued a reprimand to her. On April 9, the employer suspended Ms. Olson pending further investigation and consideration of the matter. On April 14, 2015, the employer notified Ms. Olson that she was discharged from the employment.

Ms. Olson established a claim for benefits that was effective April 12, 2015 and received benefits. Kim Huston, Human Resources Assistant, represented the employer at the fact-finding interview.

#### **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.

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 evidence in the record fails to establish a current act. The employer failed to provide evidence concerning when the offending conduct first came to the employer's attention or how long the employer had that information before the employer broached the subject with Ms. Olson. The conduct in question occurred on February 19, 2015. The employer spoke with Ms. Olson on April 8, 2015. The employer failed to present evidence to establish where in that 48-day space of time the issue came to the employer's attention. Because the evidence fails to establish a current act, the administrative law judge need not consider whether the conduct in question constituted misconduct in connection with the employment.

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

**DECISION:**

The April 22, 2015, reference 01, decision is affirmed. The evidence fails to establish a discharge based on a current act. 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