

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JULIE A WILSON

Claimant

APPEAL NO. 11A-UI-10783-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERICAN HOME SHIELD CORP

Employer

OC: 07/17/11

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Julie Wilson filed a timely appeal from the August 9, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 8, 2011. Ms. Wilson participated personally and was represented by Attorney Joseph Halbur. Attorney Jamie Cooper represented the employer and presented testimony through K'Lynn Ludwig, Kerry Osterlund, and Amy Platt. Exhibits One through Five were received into evidence.

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: Julie Wilson was employed by American Home Shield Corporation as a full-time call center associate from 1996 until July 18, 2011, when K'Lynn Ludwig, Support Operations Manager, discharged her for continuing to take unexcused breaks after being warned.

Ms. Wilson received regular breaks during her workday. Ms. Wilson was allowed a 15-minute paid break at around 8:30 a.m. and another 15-minute paid break at around 1:30 p.m. Ms. Wilson received an unpaid 45-minute lunch break at 11:00 a.m.

The final incident that triggered the discharge occurred on July 18, 2011. On that day, Ms. Wilson briefly stepped away from her workstation twice between 1:00 p.m. and 1:12 p.m. to engage in a non-work-related personal telephone call on her cell phone. At the time, Ms. Wilson was 30 minutes or less from afternoon break. Ms. Wilson's supervisor, Misty Thoof, Support Operations Supervisor, was on her lunch break at the time of the calls. Both calls caught the attention of another supervisor, Mern Irlbeck, who reported Ms. Wilson's conduct to Ms. Thoof. Ms. Wilson knew that if she needed to take a break to take a non-work-related phone call that she needed to report that to Ms. Thoof or another available supervisor, but Ms. Wilson did not attempt to report either call to any supervisor, though others were readily available.

Ms. Wilson had previously received multiple reprimands for taking unauthorized breaks. Ms. Ludwig had just spoken with Ms. Wilson on July 11 to deliver a final warning regarding Ms. Wilson taking unauthorized breaks. Ms. Ludwig told Ms. Wilson that the next such meeting would be in connection with her discharge from the employment. The July 11 reprimand followed a meeting on July 7, at which Ms. Ludwig addressed unauthorized breaks Ms. Wilson had taken on July 1, 5 and 6. On all three of those days, Ms. Wilson was observed taking an unauthorized break in the smoking area outside the facility. Ms. Wilson's unauthorized breaks had aroused the ire of one of her coworkers.

The July 2011 conduct that triggered the discharge followed reprimands for other non-work-related unauthorized conduct. That prior conduct included other unauthorized breaks and multiple instances of unauthorized Internet use at a time when Ms. Wilson was supposed to be performing her duties.

The employer was aware that Ms. Wilson's husband had ongoing health issues. For that reason, and in light of Ms. Wilson's history of unauthorized breaks, the employer conveyed to Ms. Wilson the notice the employer expected if Ms. Wilson needed to step away from her workstation to take a call related to her husband's health.

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 weight of the evidence establishes that the July 18 non-work-related phone calls were not an isolated incident, but instead occurred in the context of the ongoing problem of Ms. Wilson taking unauthorized breaks. The weight of the evidence does not support Ms. Wilson’s assertion or implication that these were somehow emergency calls that could not wait less than 30 minutes until Ms. Wilson would be able to start her authorized break. The weight of the evidence indicates instead that Ms. Wilson took the opportunity while Ms. Thooft was away to once again engage in non-work-related personal activity. While participating in the phone calls on July 18 were not Ms. Wilson’s most egregious conduct, and by themselves might not indicate misconduct that would disqualify Ms. Wilson for benefits, the conduct was part of a pattern. A week earlier, Ms. Wilson had been warned that she would be discharged for the next unauthorized break. That warning had been prompted by three more egregious violations of the employer’s break policy within six days. The evidence is sufficient to establish a pattern of conduct indicating a willful disregard of the employer’s interests and intentional disregard of the standards of conduct the employer reasonably expected.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Wilson was discharged for misconduct. Accordingly, Ms. Wilson is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer’s account shall not be charged for benefits paid to Ms. Wilson.

DECISION:

The Agency representative's August 9, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. 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 allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css