

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARGARET A MCPEAK
Claimant

APPEAL NO. 10A-UI-13850-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LYNCH LIVESTOCK INC
Employer

**OC: 09/12/10
Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) - Current Act Requirement

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 1, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 19, 2010. Claimant participated personally and was represented by Attorney Sara Reichenauer. Erin Golly, Risk Manager, represented the employer. At the request of the employer, the administrative law judge took official notice of the Agency administrative file documents submitted for or generated in connection with the fact-finding interview. A copy of said records had been provided to both parties prior to the date of the hearing.

ISSUES:

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

Whether the discharge was based on a current act of misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Margaret McPeak was employed by Lynch Livestock, Inc., on a full-time basis from June 2008 until September 10, 2010, when Gary Lynch, President, upon the recommendation of Erin Golly, Risk Manager, discharged Ms. McPeak from the employment. Ms. Golly and the employer's Chief Financial Officer executed the discharge on September 10, 2010. Ms. McPeak had started the employment as assistant to the human resources director and had become the human resources director in September 2009. Included in Ms. McPeak's duties was properly maintaining employee personnel files and I-9 employment authorization materials. The employer practices required that the I-9 materials be maintained separately from the employee personnel files so that they would be available for outside audit and also to prevent any allegation that information contained on the I-9 materials factored into any decisions affecting the employee in question.

Ms. McPeak commenced an approved leave of absence on July 9, 2010 and returned to work on August 28, 2010. The absence was covered by the Family and Medical Leave Act. The leave of absence was prompted by a non-work-related motor vehicle accident. Ms. McPeak was initially hospitalized but was discharged to home on July 14. As of August 1, Ms. McPeak was no longer taking pain medication or any other medication that would interfere with her ability to think clearly. Ms. McPeak was available to the employer. The employer was in fact in contact with Ms. McPeak regarding work related matters at the end of July. Specifically, Mr. Lynch had contacted Ms. McPeak to make certain that she had communicated information to Mr. Lynch's estranged son. Ms. McPeak returned to work on August 28, 2010 and continued to perform her regular duties until September 10, 2010, when Ms. Golly summoned her to a meeting and discharged her based on concerns regarding how she had been handling employee personnel files and the I-9 materials.

During Ms. McPeak's absence from the employment, Ms. Golly had, at the end of July, commenced an audit of Ms. McPeak's handling of the personnel files and the I-9 materials. Ms. Golly looked at 23 files and found four files containing I-9 materials. Ms. Golly found additional files that contained incomplete checklists. Ms. Golly completed her audit on August 4, 2010. She then delayed until the beginning of September presentation of a report to Mr. Lynch.

Prior to discharging Ms. McPeak from the employment, the employer did not share with her which files had generated a concern and did not give Ms. McPeak an opportunity to explain her handling of any of the files in question. Ms. McPeak had, to her knowledge, handled the files appropriately. The employer had not issued any prior reprimands to Ms. McPeak concerning her handling of the personnel files or the I-9 materials. The meeting on September 10, was the first notice Ms. McPeak had that the employer had any concern about her handling of the personnel files or the I-9 materials and the first notice she had that her handling of those items subjected her to possible discharge from the employment.

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 evidence in the record fails to establish a current act of misconduct. See 871 IAC 24.32(8). The weight of the evidence indicates that the conduct that triggered the discharge came to the employer's attention at the end of July 2010 and that the employer had completed its audit of the relevant records as of August 4, 2010. The weight of the evidence indicates that the employer then delayed a month to finalize a report. The evidence indicates that the employer delayed more than a month from the time the audit was completed to September 10, when the employer let Ms. McPeak know that the audit completed on August 4 could subject her to possible discharge from the employment. The evidence indicates that Ms. McPeak was available to the employer from the end of July onward and there was nothing to prevent the employer from raising the matter with Ms. McPeak well before September 10, including during the period of the approved leave of absence. The fact that Ms. McPeak was on an authorized FMLA leave in no way prevented the employer from moving forward with matters relating to alleged misconduct. In any event, even after Ms. McPeak return to work on August 28, 2010, the employer delayed another 13 days before discussing the matter with Ms. McPeak. The employer's delay was unreasonable. Because the discharge was not based on a current act of misconduct, the discharge would not disqualify Ms. McPeak for unemployment insurance benefits. See 871 IAC 24.32(8). Because the discharge was not based on a current act, the administrative law judge need not consider or determine whether the conduct in question constituted misconduct.

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

DECISION:

The Agency representative's October 1, 2010, reference 01, decision is affirmed. 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/pjs