

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VICKIE R BOWLIN
Claimant

APPEAL NO. 12A-UI-06645-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KUM & GO LC
Employer

OC: 05/13/12
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 May 30, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 27, 2012. Claimant participated. Andre Buckner represented the employer.

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: Vickie Bowlin was employed by Kum & Go as a full-time Sales Manager (assistant manager) from 2002 until May 10, 2012, when Store Manager Andre Buckner discharged her for alleged theft. The employer alleges an incident of theft occurred on March 23, 2012. After review of sales transaction records, Human Resources Representative Erica Teitz believed that Ms. Bowlin had rung up a ready-to-eat food item and suspended the transaction. Exactly one week after the alleged theft, Mr. Buckner received a telephone call from Ms. Teitz. At Ms. Teitz's request, Mr. Buckner reviewed video surveillance regarding the transaction. Mr. Buckner concluded the video surveillance confirmed theft of the food item. The employer then waited more than a month, until May 10, 2012, to speak to Ms. Bowlin. The employer did not interview Ms. Bowlin. Instead, when Ms. Bowlin arrived for work on May 10, Mr. Buckner told her she was discharged from the employment. Mr. Buckner initially declined to tell Ms. Bowlin the reason for the discharge, but then told her it was for eating food without paying for it. Ms. Bowlin said, "Okay," surrendered her work jacket, and left.

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 administrative law judge notes that the employer witness was poorly prepared for the hearing and was uncertain about basic information, including the last date of the claimant's employment. The employer witness's uncertainty about such basic information calls into question the general reliability of the employer witness's testimony. The employer did not present any documentation or video surveillance evidence, despite the fact that both appear to have been available to the employer and to have been considered when making the decision to discharge the claimant. The administrative law judge further notes the employer witness became uncivil during the hearing. When the administrative law judge stopped Mr. Buckner's question for Ms. Bowlin because the question included an attempt to testify, Mr. Buckner chose to argue the matter, rather than rephrase the question. Even after the administrative law judge explained that the question in cross-examination of Ms. Bowlin could not be combined with Mr. Buckner's own testimony, Mr. Buckner continued in an uncivil manner to the end of the hearing. This included carrying on conversations with third parties, which conversations are now part of the hearing record, despite the administrative law judge having pointed out earlier in the hearing that such conversations could spoil the hearing record.

The evidence in the record fails to establish a current act of misconduct. The employer cites as the basis for the discharge an incident alleged to have occurred on March 23, 2012. The incident was fully investigated no more than a week later. That puts the conclusion of the investigation at the end of March 2012. The employer has failed to provide a reasonable basis for its delay in raising the matter with Ms. Bowlin for more than a month after the investigation had concluded. Because there is not current act, the administrative law judge concludes that Ms. Bowlin was discharged for no disqualifying reason. Accordingly, Ms. Bowlin is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Bowlin.

DECISION:

The Agency representative's May 30, 2012, reference 01, decision is affirmed. The discharge was not 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/pjs