

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MCCARREN, JANELLE, A
Claimant

APPEAL NO. 11A-UI-00911-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DILLARD'S, INC.
Employer

OC: 12/26/10
Claimant: Appellant (2-R)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the January 18, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 7, 2011. Claimant participated. The employer failed to respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate.

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: Janelle McCarren was employed by Dillard's, Inc., as a full-time sales associate and beauty consultant from October 2008 until December 28, 2010, when a three-member group of managers discharged her from the employment. On December 28, 2010, Ms. McCarren was summoned for a meeting to a meeting with the managers, who told her she was being discharged from the employment. The managers reviewed with Ms. McCarren her discipline history, which did not include anything recent. When Ms. McCarren asked why she was being discharged, one of the managers responded that the employer thought it was about time. The employer did not cite a particular final incident as a trigger for the discharge.

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 employer failed to participate in the hearing and thereby failed to present any evidence whatsoever to support an allegation that Ms. McCarren was discharged for misconduct in connection with the employment. The evidence in the record establishes no misconduct. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. McCarren was discharged for no disqualifying reason.

Accordingly, Ms. McCarren is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. McCarren.

This matter was originally set for appeal hearing on February 21, 2011, but was postponed at Ms. McCarren's request. In her written postponement request, dated February 16, 2011, Ms. McCarren indicated she was out of the country and would not return to the United States until after February 23, 2011. In addition, Workforce Development records indicate that Ms. McCarren has not used the telephonic automated weekly claim reporting system since she established her claim for benefits. This matter will be remanded to the Claims Division for determination of whether and when Ms. McCarren has been available for full-time employment since she established her claim for benefits.

DECISION:

The Agency representative's January 18, 2011, reference 01, decision is reversed. 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.

The matter is remanded to the Claims Division for determination of whether the claimant has been available for work since she established her claim for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css