

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

MARISSA A MAGDEN
2417 – 70TH ST
URBANDALE IA 50322-4827

MOTHERS WORK INC
c/o TALX EMPLOYER SERVICES
PO BOX 429503
CINCINNATI OH 45242-9503

Appeal Number: 06A-UI-01792-JTT
OC: 02/13/05 R: 02
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Mothers Work filed an appeal from the February 2, 2006, reference 04, decision that allowed benefits. After due notice was issued, a hearing was held on March 2, 2006. Claimant participated. District Manager Laura Holman represented the employer and presented additional testimony through Heather McConnell of TALX UC Express. Exhibits One through seven were received into the record; Exhibits Two, Three, and Five were of poor quality and essentially illegible; the employer provided testimony regarding the content of those documents. The administrative law judge took official notice of Workforce Development records regarding the claim for benefits, the employer's protest, and the employer's appeal. Department Exhibits D-1 and D-2 were received in the evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The February 2, 2006, reference 04, decision was mailed to the employer's last known address of record on February 2, 2006. TALX Employer Services received the decision on February 6. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by February 12, 2006. Talks representative Heather McConnell drafted the employer's appeal on February 10, 2006 and mailed the appeal on that date. The appeal bears a completion date of February 10, 2006. Workforce Development did not keep the envelope that accompanied the appeal and did not date-stamp initial receipt of the appeal. The appeal was eventually received at the Appeals Section on February 14 2006 from elsewhere in the Agency.

Marissa Magden was employed by Mothers Work as a full-time assistant manager from June 6, 2005 until January 5, 2006, when District Manager Laura Holman discharged her. At the time of discharge, Ms. Magden's immediate supervisor was Store Manager Kate Dobberke, who was new to the employment. Ms. Dobberke is still employed by Mothers Work, but did not testify at the hearing.

The final incident that prompted the discharge occurred on January 3, 2006 and came to the attention of the employer on the same day. Part-time sales clerk Holly Kapler telephoned District Manager Laura Holman and reported that Ms. Magden had suggested Ms. Kapler engage in unethical conduct in connection with a \$27.10 cash register shortage. Ms. Kapler made a similar report to Ms. Dobberke. Ms. Kapler asserted that she had telephoned Ms. Magden to advise of a \$27.10 cash register shortage and that Ms. Magden had told her to locate a receipt for a cash sale from that day that approximated the amount of the shortage and to void that transaction so that the cash register would no longer reflect a shortage. Ms. Kapler is still employed by Mothers Work, but did not testify at the hearing.

In response to the report from Ms. Kapler, Ms. Holman went to the Valley West Mall store on January 5, ostensibly to conduct an investigation. Ms. Holman spoke with Ms. Kapler, who repeated the allegation. Ms. Kapler also brought to Ms. Holman's attention a customer's written complaint the store had received on January 4. His Kapler provided a brief written statement regarding the cash register shortage and the customer complaint. Ms. Holman next met with Ms. Magden. During the meeting, Ms. Holman accused Ms. Magden of stealing from the cash register. Ms. Magden denied stealing from the employer and indicated she would not engage in such behavior. Ms. Holman next quizzed Ms. Magden regarding whether she had stolen various types of merchandise from the store. Ms. Magden denied the allegations. Ms. Holman then threatened to summon the employer's loss prevention officers to conduct an investigation. Ms. Magden responded by requesting that the loss prevention officers be summoned and asserted an investigation would exonerate her. Ms. Holman then indicated she did not need any further proof of the alleged theft. Ms. Holman proceeded to discharge Ms. Magden from the employment. Ms. Magden requested that Ms. Holman reduce the discharge to writing. Ms. Holman indicated she did not need to do so and added that she could discharge Ms. Magden based on a customer complaint. Ms. Holman had not made Ms. Magden aware of the complaint the employer had just received. Ms. Magden assumed that Ms. Holman was referring to an incident further back in time. Ms. Holman did not discuss the customer complaint with Ms. Magden.

Ms. Magden had not in fact suggested to part-time sales clerk Holly Kapler that Ms. Kapler "post-void" a transaction. Instead, when Ms. Kapler contacted Ms. Magden regarding the cash

register discrepancy, Ms. Magden had merely suggested that Ms. Kapler review the day's transactions, including any voided transactions, to see whether any of the transactions accounted for the cash register discrepancy.

The employer had reprimanded Ms. Magden in October in connection with a \$30.00 cash register overage on October 5 and a \$50.00 cash register shortage on October 13. Regarding the overage, Ms. Magden had erroneously entered a transaction twice, immediately recognized her error, and reported the error to her supervisor. Regarding the \$50.00 shortage, the shortage resulted from the previous evening's transactions when Ms. Magden had not been working and Ms. Magden's error had consisted of not discovering the shortage at the time she began her shift the next morning.

The employer had reprimanded Ms. Magden on January 4 for leaving the safe unsecured on December 30, 2005. The safe had been left with the door closed but the lock not secured at a time when the store was open and at least two other employees had access to the safe. Both of those employees knew the combination to the safe and were authorized to access the safe. The employer provided no testimony from the other employees who had been on duty at the time the safe was left unsecured.

The employer had reprimanded Ms. Magden on December 12, 2005 in connection with Ms. Magden's use of profanity on December 1, 2005. The manager of the Merle Hay Mothers Work store, Sandy Anderson, was the acting manager for the Valley West store at the time. Ms. Magden was reporting to Ms. Anderson about a complaint the store had received about Ms. Anderson. The complaining customer had referred to Ms. Anderson as a "bitch." Ms. Magden included this language in her report to Ms. Anderson. A customer was in the store but out of listening range at the time Ms. Magden uttered the remark. Nonetheless, the employer reprimanded Ms. Magden for using profanity when a customer was in the store.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge will first address the issue of timeliness of the appeal.

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter mark or if the mark is illegible, on the date entered on the document as the date of completion. See 871 AC 24.35(1)(a). See also Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983).

Since the Agency did not keep the envelope in which the appeal was submitted, the administrative law judge concludes, based on the completion date on the appeal and the testimony of the TALX representative, that appeal was filed on January 10, 2006, that the appeal was timely and that the administrative law judge has jurisdiction to consider the merits of the appeal.

The next question is whether the evidence in the record establishes that Ms. Magden was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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 to 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).

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).

Aside from Ms. Holman's testimony regarding the unsecured safe, the employer failed to provide testimony from first-hand witnesses to the alleged misconduct that prompted the

discharge or any prior alleged misconduct. The employer had the ability to present such evidence, but failed to do so. The administrative law judge concludes that such direct and satisfactory evidence would have revealed further deficiencies in the employer's case. Ms. Magden, on the other hand, provided credible testimony that refuted the employer's assertions of misconduct. Ms. Magden's testimony was internally consistent and consistent with both reason and common sense. The testimony presented at the hearing, taken altogether, paints the picture of an employer eager to find misconduct and who communicated the same eagerness to Ms. Magden's coworkers. The evidence in the record fails to establish any intentional disregard of the employer's interests on the part of Ms. Magden or any negligence and/or carelessness sufficiently recurrent to amount to a willful disregard of the employer's interests.

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

DECISION:

The employer's appeal was timely. The Agency representative's decision dated February 2, 2006, reference 04, 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.

jt/tjc