

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

REANDA M HAMIL
Claimant

APPEAL NO. 06A-UI-11189-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TASTY TACOS INC
Employer

OC: 10/08/06 R: 02
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Tasty Tacos filed a timely appeal from the November 13, 2006, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on December 6, 2006. Claimant Reanda Hamil did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Manager and Co-owner Margie Chilton represented the employer. The administrative law judge took official notice of the Agency's records regarding benefits disbursed to the claimant.

ISSUE:

Whether the claimant voluntarily quit the employment.

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: Reanda M. Hamil was employed by Tasty Tacos as a full-time cook from March 17, 2006 until March 25, 2006. Ms. Hamil worked at the employer's 5046 South East 14th location. Manager Becky Tighe was Ms. Hamil's immediate supervisor. Ms. Tighe is still employed by Tasty Tacos, but did not testify at the hearing. The employer's representative and only witness, Manager and co-owner Margie Chilton, had no personal contact with Ms. Hamil during the employment and has no recollection of Ms. Hamil as an employee.

REASONING AND CONCLUSIONS OF LAW:

The first question is whether Ms. Hamil quit or was discharged from the employment. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local

Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

The administrative law judge is confronted with three obstacles in deciding this issue. First, the claimant did not participate in the hearing. Second, the employer did not present testimony from Manager Becky Tighe, the only person on the employer's management staff that might have personal knowledge of Ms. Hamil's employment and separation from the employment. Third, the employer's representative was able to provide minimal information regarding the circumstances of the separation from the employment. The information the employer provided regarding the separation was contradictory. On the one hand, the employer's witness thinks the claimant quit. On the other hand, the employer's witness thinks the claimant was not working fast enough. The greater weight of the evidence does not demonstrate a quit. Instead, the greater weight of the evidence demonstrates a discharge.

The next question is whether the evidence in the record establishes that Ms. Hamil 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.

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 any misconduct whatsoever. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Hamil was discharged for no disqualifying reason. Accordingly, Ms. Hamil is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Hamil. The administrative law judge notes that the employer's maximum total liability for benefits paid to this claimant is \$94.25.

DECISION:

The Agency representative's November 13, 2006, reference 02, 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/kjw