

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STACEY L SAUNDERS
Claimant

APPEAL NO. 07A-UI-10577-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERICAN SIDING & WINDOW SYS INC
Employer

**OC: 10/21/07 R: 02
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Stacey Saunders filed a timely appeal from the November 13, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 3, 2007. Ms. Saunders participated and presented additional testimony from Gary Johnson and Jerri Parkison. Pat Pagano, Operations Manager, represented the employer and presented additional testimony from Colleen Pagano, sole shareholder. Exhibits One through Three and Five through Eight were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Stacey Saunders was employed by American Siding & Window Systems as a full-time Accounting Assistant from September 12, 2003 until October 23, 2007, when Pat Pagano, Operations Manager, discharged her for refusing to participate in a meeting that included Mike Pagano.

The final incident that prompted the discharge occurred on October 23, 2007. Mr. Pagano arranged a meeting with Ms. Saunders to discuss issues related to a bay window that had been removed from the employer's inventory and had been delivered to Ms. Saunders' home without prior payment. Mr. Pagano also wanted to discuss with Ms. Saunders' her failure to comply with an agreement to reimburse the employer for plane tickets for an upcoming trip.

When Ms. Saunders arrived for the meeting, Pat Pagano's father, Mike Pagano, was also present in the conference room. Mike Pagano had turned over business operations to Pat Pagano in March 2007 and no longer had an official role in the business. Mike Pagano had a well-established reputation for erupting in tirades of verbal abuse directed at employees. Ms. Saunders had witnessed such incidents directed at other employees and had heard of additional incidents. Ms. Saunders was also aware that Mike Pagano's belligerence had involved violence and/or physical aggression on at least two occasions. Ms. Saunders asked Pat Pagano if she could have another employee present to witness the discussion and Pat Pagano arranged for a female office employee to be present. Ms. Saunders requested that Mike Pagano not be present. Pat Pagano

denied this request. Pat Pagano was aware of his father's reputation for, and habit of, verbally abusive behavior. Ms. Saunders advised Pat Pagano that she was not willing to meet with Mike Pagano in the room. In response, Pat Pagano told Ms. Saunders she was fired. Pat Pagano had not been planning to discharge Ms. Saunders in connection with the two matters that prompted the meeting.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The greater weight of the evidence indicates that Pat Pagano's insistence that Mike Pagano be present for the October 23, 2007 meeting was unreasonable. At the time of the meeting, Mike Pagano had no official title or responsibilities in connection with American Siding & Window Systems. Mike Pagano's presence at the meeting was not only unnecessary; it clearly hindered the employer's purported goal of investigating the two matters Pat Pagano wanted to address with Ms. Saunders. Given Mike Pagano's established reputation for verbal abuse and/or physical aggression, it was reasonable for Ms. Saunders to request that he not be present for the conference. It was also reasonable for Ms. Saunders to refuse to submit to a meeting with Mike Pagano present. Ms. Saunders had no obligation to subject herself to the likely prospect of verbal abuse or physical aggression.

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

DECISION:

The Agency representative's November 13, 2007, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw