

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CLAAR, VALARIE, M
Claimant

APPEAL NO. 12A-UI-01047-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DILLARD'S, INC.
Employer

**OC: 12/25/11
Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the January 20, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 20, 2012. Claimant provided a telephone number for the hearing but was not available at that number at the time of the hearing and did not participate. Robin McMillen, Store Manager, represented the employer. Exhibits One through Seven were received into evidence.

ISSUES:

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

Whether the discharge was based on a current act of misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed by Dillard's as a full-time sales associate from February 2011 until December 26, 2011, when Store Manager Robin McMillen discharged her from the employment for repeated violation of a company rule. The employer had a written work rule that prohibited employees from ringing up their own merchandise purchases. The claimant was aware of the work rule. The claimant violated the work rule multiple times before being issued a reprimand in September 2011. The claimant was warned at that time that future similar conduct could lead to her being discharged from the employment. On November 25, 2011, Black Friday, the claimant again attempted to ring up her own merchandise. The employer's computer system blocked and flagged the transactions. The claimant immediately notified an assistant manager of her conduct. Store management looked for but could not locate the offending transactions. On December 12, 2011, the employer's corporate audit department sent notice to the store of the offending November 25, 2011 transactions. The employer then waited until December 26, 2011, the day after Christmas, to further raise the matter with the claimant. The employer notified the claimant at that time that she would be discharged from the employment due to the November 25 conduct and the earlier violations of the same work rule.

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 evidence in the record establishes that the claimant was discharged for misconduct in connection with the employment. The misconduct was the repeated knowing and intentional violation of the employer's prohibition against ringing up her own purchases. The purpose of such a policy is to prevent employee theft. The claimant was well aware of the policy. Though there was misconduct in connection with the employment, the discharge was not based on a current act. Instead, the discharge was based on conduct that occurred on November 25 and that came to the employer's attention on November 25. The November 25 conduct again came to the employer's attention on December 12, when the employer's corporate office brought the matter back to the employer's attention. The weight of the evidence indicates that the employer waited until December 26 to notify the claimant that the November 25 incident could and would result in her being discharged from employment. The employer is unable to provide an explanation, beyond the busy shopping season, regarding why the claimant was allowed to work from November 25 until December 26 before the employer notified her that the November 25 conduct could and would result in her discharge from employment. The weight of the evidence indicates that the employer kept the claimant employed for a month after the offending conduct in order to obtain the benefit of the claimant's services during the busy holiday shopping season and then discharged the claimant once her services were no longer needed.

Because the evidence fails to establish a discharge based on a current act, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

DECISION:

The Agency representative's January 20, 2012, reference 01, decision is reversed. The discharge was not based on a current act. 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/css