

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DIANNE S CURRIE

Claimant

APPEAL NO. 09A-UI-04787-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NEIGHBORHOOD PATROL INC

Employer

OC: 07/27/08

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 24, 2009, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on April 23, 2009. Claimant Dianne Currie did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Dick Rogerson, Director of Human Resources, represented the employer and presented additional testimony through Dave Lee, Operations Manager.

ISSUE:

Whether Ms. Currie 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: Dianne Currie was employed by Neighborhood Patrol, Inc., (NPI) as a full-time security officer from April 2004 until March 4, 2009, when David Lee, Operations Director, and Dick Rogerson, Director of Human Resources, discharged her from the employment. Mr. Lee was Ms. Currie's immediate supervisor.

The final incident that prompted the discharge occurred on February 27, 2009. At the time, Ms. Currie was posted at a townhome complex. At some point between February 27 and March 1, the Director of Operations for the townhome complex telephoned Mark Kirschner, NPI Vice President, and reported that Ms. Currie had been rude to the property manager and one of the owners as they left the facility, by not acknowledging the pair as they attempted to provide information to her on their way out. Mr. Lee learned of the incident from Mr. Kirschner on March 2, 2009. Mr. Lee went to the job site and removed Ms. Currie. The employer was willing at that time to place Ms. Currie in another post, but later decided to discharge her from the employment instead.

In making the decision to discharge Ms. Currie from the employment, the employer considered prior customer complaints and Ms. Currie's removal from prior posts. In 2005, the employer removed Ms. Currie from a post at ING in response to a complaint from the ING Director of

Security that Ms. Currie was prone to emotional outbursts, was discourteous to guests, and had unpredictable behavior. In June 2008, the Director of Security for the Hy-Vee corporate facility requested Ms. Currie's removal after Ms. Currie asked Hy-Vee to recommend to NPI that Ms. Currie receive a pay raise. In November 2008, Farm Bureau requested that Ms. Currie be removed after Ms. Currie asked a Farm Bureau representative to buy her lunch. Farm Bureau reported that Ms. Currie was prone to making jokes, prone to not carefully monitoring security monitors, and did not take her job seriously. Ms. Currie's response to these reports was always a denial of the alleged conduct and an allegation that someone else was at fault.

The employer also considered Ms. Currie's history of tardiness. But the most recent incident of tardiness had occurred in October 2008.

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).

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 administrative law judge concludes that the employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to prove misconduct in connection with the final incident that prompted the discharge. The evidence indicates that the townhome property manager or owner made a report, directly or indirectly, to the townhome's Director of Operations. This person forwarded the allegation of rudeness and so forth to Mark Kirschner, NPI Vice President. Mr. Kirschner forwarded the information to Mr. Lee, who removed Ms. Currie from the post and discharged her from the employment. Mr. Lee had no direct contact with the complaining party. It appears that Mr. Kirschner had no direct contact with the complaining party. There is a question regarding whether the townhome's director of operations had direct contact with the complaining party or parties. The administrative law judge concludes that the employer had the ability to present much more direct and satisfactory evidence to support or corroborate the allegation of misconduct in connection with the final incident that triggered the discharge.

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

DECISION:

The Agency representative's March 24, 2009, 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/pjs