

employment under the prior ownership, Ms. Fatino had established a good personal relationship with the owners, who expressed their appreciation of Ms. Fatino both during the employment and after the employer-employee relationship ended. New owners began to operate the franchise approximately one month before Ms. Fatino was discharged.

The final incident that prompted the discharge occurred on August 3, 2005, when Mr. Todd received one or more complaint about Ms. Fatino from one or more of her coworkers. The complaints concerned Ms. Fatino (1) not completing her prep work; (2) taking too long to complete work; (3) taking cigarette breaks that were too long and taken at inappropriate times; and (4) causing general distress to her coworkers. All but one of the complaining coworkers continues to work for Papa Murphy's. All but one of the complaining workers worked the evening shift. The evening shift relied on Ms. Fatino, as a day shift employee, to perform prep work that the evening shift would not have time to perform. The employer presented no testimony from any of the complaining employees. On August 4, Mr. Todd spoke to the new owners of the franchise, who decided to discharge Ms. Fatino.

On August 6, Ms. Fatino appeared for a scheduled staff meeting. After the meeting, Mr. Todd spoke with Ms. Fatino about the concerns raised by her coworkers. At that time, Ms. Fatino apologized for any issues in her work performance and indicated that she had personal problems that were impacting her work performance. Ms. Fatino indicated a willingness to address any deficits in her work performance. Though Ms. Fatino did not share the details of her personal problems with Mr. Todd, Ms. Fatino had recently learned that her adult daughter was addicted to methamphetamine. Ms. Fatino has a rather nervous demeanor and the circumstances surrounding her daughter may have caused her to appear more confused than usual about what was expected of her at work. Ms. Fatino had been uncertain of her exact role in the workplace since the new owners took over operations. This confusion included Ms. Fatino not being certain whether she continued to function as the prep manager or whether that title belonged to the newly promoted assistant manager who worked with Ms. Fatino on the day shift. Ms. Fatino was working to the best of her ability. At the end of the conversation on August 6, Mr. Todd discharged Ms. Fatino from the employment.

Ms. Fatino had not been formally counseled or reprimanded in the course of the employment.

The employer listed on the September 6, 2005, reference 02, decision is KLP Enterprises L.L.C. Effective July 5, 2005, BES-t Investments L.L.C. owned and operated the Papa Murphy's restaurant where Ms. Fatino worked. BES-t Investments L.L.C. had purchased the restaurant from KLP Enterprises L.L.C.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Fatino 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).

Since the claimant was discharged, 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 her 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 evidence in the record fails to establish that Ms. Fatino was discharged for misconduct in connection with the employment. The employer failed to meet its burden of proving the alleged misconduct by failing to present sufficient evidence to support or corroborate the allegation of misconduct. The employer had the ability to present much more direct and

satisfactory evidence in the form of testimony from other employees and failed to present such testimony. It is reasonable to infer that presentation of such testimony would have exposed deficiencies in the employer's case. The weight of the evidence in the record indicates that Ms. Fatino performed her duties to the best of her ability and was discharged primarily for working inefficiently. This is not misconduct. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Fatino was discharged for no disqualifying reason. Ms. Fatino is eligible for benefits, provided she is otherwise eligible.

This matter will be remanded to the tax department for a determination of the correct employer account to be charged for benefits paid to Ms. Fatino.

DECISION:

The Agency representative's decision dated September 6, 2005, reference 02, is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. This matter is remanded to the tax department for a determination of the correct employer account to be charged for benefits paid to the claimant.

jt/s