

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**STEPHANIE A SCHLICHTE**

Claimant

**APPEAL NO. 16A-UI-08617-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY**

Employer

**OC: 06/26/16**

**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 July 28, 2016, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an agency conclusion that the claimant was discharged on June 27, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on August 24, 2016. Claimant Stephanie Schlichte participated. Angela Boge represented the employer and presented additional testimony through Kelly Rohrbouck. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Exhibits One through 11 were received into evidence. Exhibit 12, a flash drive, was excluded from evidence because the claimant did not receive or have an opportunity to review the exhibit prior to the appeal hearing. Inclusion of Exhibit 12 would have had no effect on the outcome of this case.

**ISSUES:**

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

Whether the employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Stephanie Schlichte was employed by Casey's Marketing Company as a part-time clerk from January 2015 until June 27, 2016, when Store Manager Connie Myers discharged her from the employment for violating the employer's cell phone policy and break policy. Ms. Myers was Ms. Schlichte's immediate supervisor.

The employer has a written cell phone policy that prohibits "use of cellular telephones ... in the store while employees are on duty, which includes sending or receiving text messages." The policy further states that, "The store telephone number may be used for family emergencies. Any employee found to be in violation of this policy will be subject to corrective action, up to and including termination." The written cell phone policy is contained in the employee handbook.

The employer does not provide employees with their own copy of the employee handbook, but maintains a copy of the handbook in the workplace. Employees may access the handbook at any time. Ms. Schlichte signed a handbook acknowledgment at the start of her employment. Ms. Schlichte was aware of the written cell phone policy.

The employer has a written break policy in the employee handbook. The policy indicates that the employer is not required by law to provide employee breaks. The handbook policy indicates that a separate state-specific policy would apply. The handbook policy indicates that employees may use the restroom as needed throughout the shift. The handbook policy indicates that smoke breaks are to conform with the break policy applicable to all employees. The break policy specific to the store where Ms. Schlichte worked originated with Ms. Myers. The policy prohibited breaks until after an employee had worked four hours. The policy also prohibited breaks between 6:00 and 8:00 a.m., 11:00 a.m. and 2:00 p.m., and 6:00 p.m. and 8:00 p.m. That meant that when Ms. Schlichte worked a 4:00 p.m. to 11:00 p.m. shift, she either had to wait to take her break until after 8:00 p.m., but could use the restroom as needed throughout the shift.

In the months leading up to Ms. Schlichte's discharge, Ms. Myers had twice addressed the cell phone policy and the break policy at staff meetings. On January 11, 2016, Ms. Schlichte participated in a staff meeting. At that staff meeting, Ms. Myers reinforced that cell phones were not allowed to be used during working hours. Ms. Myers told the store employees that the prohibition meant that cell phones were not to be kept in work smock pockets. Ms. Myers told the store employees that she was aware that some employees were taking their cell phones to the restroom and using the cell phones in the restroom in violation of the policy. Ms. Myers told the store employees that such violations made the violating employee less productive at work and shifted the work burden to other employees. Ms. Myers told the store employees that breaks were only available after the employee had worked four hours. Ms. Myers told the employees that some had been taking excessive breaks, including smoking breaks and breaks to use cell phones.

On March 15, 2016, Ms. Schlichte participated in another staff meeting wherein Ms. Myers addressed the cell phone policy and the break policy. Ms. Myers told the store employees that she had been reviewing the store's video surveillance tape and had observed excessively long breaks, including at times when the store was busy. Ms. Myers told the store employees that smoke breaks were not allowed until after the employee had worked four hours. Ms. Myers told the store employees that restroom breaks were restricted to using the restroom and were not to include cell phone use. Ms. Myers directed employees not to carry cell phones in work smock pockets during work hours. Ms. Myers directed the employees to turn off or silence their phones when clocked in. Ms. Myers directed the store employees to keep their cell phones in their purses or in their cars. Ms. Myers directed the store employees to limit use of the store phones to brief calls and indicated she was aware that some were using the store phones for long periods and thereby interfered with customer service.

The final incident that triggered the discharge occurred during Ms. Schlichte's shift on Friday, June 17, 2016 and came to Ms. Myers' attention when she reviewed video surveillance recorded during that shift. Ms. Schlichte was scheduled to work with bossy coworker, Dawn Rundy, who Ms. Schlichte believed had been harassing her. The situation that Ms. Schlichte describes in her testimony does not rise to the level of harassment. However, Ms. Schlichte appears to have an anxiety disorder and was exceedingly anxious about working with Ms. Rundy. Ms. Schlichte was assigned to work in the kitchen. Another employee was assigned to assist Ms. Schlichte with making pizzas. In July 2015, Ms. Schlichte provided the employer with a doctor's note that said she needed to have sit-down breaks due to back pain.

The note expired on March 30, 2016. Ms. Schlichte did not provide a more recent note. On June 17, Ms. Schlichte was dealing with an abdominal hernia that prompted her to use the restroom more than usual. On June 17, Ms. Schlichte worked 4:00 p.m. to 11:00 p.m. shift. At 5:36 p.m., Ms. Schlichte retrieved her cell phone from her purse. At 5:46 p.m., Ms. Myers exited the store. Ms. Schlichte went to her car to smoke a cigarette and to use her cell phone to speak with her children. When Ms. Schlichte re-entered the store, she made her way to the restroom. Ms. Schlichte took her cell phone with her into the restroom. The restroom area is out of the surveillance cameras' view. At 5:54 p.m., Ms. Schlichte returned her cell phone to her purse. Ms. Schlichte was away from her work duties for 18 minutes total. At 8:18 p.m., Ms. Schlichte took another break and retrieved her cell phone from purse. Ms. Schlichte exited the store and re-entered at 8:30 p.m. Ms. Schlichte traveled to the restroom. Ms. Schlichte emerged from the restroom at 8:48 p.m. At 8:54 p.m., Ms. Schlichte returned to the kitchen area of the store and returned her cell phone to her purse.

Ms. Schlichte last performed work for the employer on June 24, 2016. On that day, Ms. Schlichte spoke to Ms. Myers about her intention to file a complaint with the employer's corporate office regarding Ms. Myers' handling of Ms. Schlichte's issues with Ms. Rudy. Ms. Schlichte had learned that Ms. Rudy had been promoted to Kitchen Manager. Ms. Schlichte requested a complaint form. At the time Ms. Schlichte left the workplace on June 24, she had an understanding with Ms. Myers that she would return on June 27 to deliver her written complaint to Ms. Myers so that it could be forwarded to the corporate office. Prior to Ms. Schlichte's return on June 27, Ms. Myers had reviewed the surveillance record that included the June 17 shift and had prepared discharge documentation. On June 27, Ms. Myers handed the discharge documentation to Ms. Schlichte and told her she was discharged from the employment for violating the employer's break and cell phone policies. Ms. Schlichte asserted that Ms. Myers had unjustly included Ms. Schlichte's restroom time in the overall break time. The employer had not issued any prior reprimands to Ms. Schlichte.

## **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in a discharge case. 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 employer failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to prove misconduct in connection with the employment that would disqualify Ms. Schlichte for unemployment insurance benefits. The employer had the ability to present testimony through Ms. Myers, but elected not to present such testimony. The weight of the evidence does establish that Ms. Schlichte violated both the cell phone policy and the break policy on June 17. The weight of the evidence indicates that Ms. Schlichte's first break took place barely an hour and a half into the shift. The weight of the evidence establishes that the employer was consistent in requiring employees to wait at least four hours into the shift to take a break and that Ms. Schlichte was aware of that requirement. Ms. Schlichte's anxiety and her health issues are mitigating factors. The weight of the evidence establishes that Ms. Schlichte's pending complaint prompted Ms. Myers to review the surveillance record in search of a reason to justify discharging Ms. Schlichte from the employment. In the absence of proof of prior break and/or cell phone policy violations, and in the absence of prior reprimands for such conduct, the evidence is insufficient to establish conduct that rises to the level of both a willful and wanton disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Schlichte was discharged for no disqualifying reason.

Accordingly, Ms. Schlichte is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The July 28, 2016, reference 01, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs