IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

AMANDA J BRONEMANN
Claimant

GIT-N-GO CONVENIENCE STORES INC
Employer

APPEAL NO. 17A-UI-12238-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/29/17
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 17, 2017, 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 the Benefits Bureau deputy's conclusion that the claimant was discharged on October 24, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on December 18, 2017. Claimant Amanda Bronemann participated. Jeff English represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Department Exhibits D-1 to D-15 into evidence.

ISSUES:

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

Whether the claimant was overpaid unemployment insurance benefits.

Whether the claimant must repay 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: Amanda Bronemann was employed by Git-N-Go Convenience Stores, Inc. from January 2016 until October 24, 2017, when Supervisor Jeff English discharged her from the employment. Mr. English was the area supervisor over 18 stores. Ms. Bronemann began the employment as a cashier. Within a couple months of hire, Ms. Bronemann was promoted to Assistant Manager. In April 2016, Ms. Bronemann was promoted to Store Manager. In May 2016, Ms. Bronemann was demoted to cashier in response to tardiness issues. In September 2016, Ms. Bronemann was transferred to Store Number 2 on Army Post road and promoted to Assistant Manager. In November 2016, Mr. Bronemann was promoted to Store Manager at Store Number 2. From

September 2016 until the end of the employment, Mr. English was Ms. Bronemann's immediate supervisor. As Store Manager, Ms. Bronemann received a weekly salary of $650.00. As Store Manager, Ms. Bronemann's official work hours were 6:00 a.m. to 4:00 p.m., Tuesday through Saturday. However, because the store opened at 6:00 a.m., Ms. Bronemann would have to arrive before 6:00 a.m. to prepare the store for opening. As Store Manager, Ms. Bronemann was expected to remain available to address staffing issues and other issues at Store Number 2 outside her established work schedule. The employer communicated this responsibility to Ms. Bronemann when she was initially promoted to a Store Manager position and when she was promoted to Store Manager of Store Number 2. Ms. Bronemann was aware of this responsibility at all relevant times. Mr. English was responsible for making certain that the all of the 18 stores under his supervision opened at the appropriate time and were appropriately staffed. Git-N-Go employs "merchandizers" whose duties include traveling to various stores to make changes, help with grocery orders, and open and operate stores as needed. The employer tracks morning arrival times for store managers and assistant managers through alerts the employer receives from a third party security firm. The opening manager has to deactivate the security alarm, which triggers notice to the security firm. During Ms. Bronemann's time as Store Manager of Store Number 2, the store also had an assistant manager.

The final incident that triggered the discharge occurred on or about October 22, 2017, when the assistant manager did not show up for work. The assistant manager was supposed to appear at the store by 5:30 a.m. to make sure the store opened at 6:00 a.m. Ms. Bronemann was scheduled off that day and had made arrangements to attend a birthday party in Urbandale. At 7:30 a.m., a Git-N-Go merchandizer arrived at Store Number 2 and found that it had not opened. The merchandizer opened the store and used the store's phone to attempt to reach Ms. Bronemann. Ms. Bronemann did not answer the merchandizer's calls or respond to the merchandizer's voice mail messages. At about 8:10 a.m., the merchandizer notified Mr. English that Store Number 2 had not opened on time and that the merchandizer had been unable to reach the assistant manager or Ms. Bronemann. Mr. English then began his attempts to reach Ms. Bronemann. Mr. English called Ms. Bronemann's number at 8:20 a.m., 11:00 a.m. and noon. Mr. English left messages directing Ms. Bronemann to contact him because the assistant manager had not appeared for work at Store Number 2. Ms. Bronemann got the messages, but elected not to respond. Because neither Ms. Bronemann nor the assistant manager responded to Store Number 2, the merchandizer operated the store until the evening clerk arrived at 4:00 p.m. At 4:00 p.m., Ms. Bronemann telephoned Store Number 2 to confirm that the evening person had arrived.

On October 23, Mr. English telephoned Ms. Bronemann to address her failure to respond to his calls and the merchandizer's calls. Ms. Bronemann attempted to mislead Mr. English by stating that she had been "out-of-town" at a birthday party for her niece and nephew and was still "out-of-town." Ms. Bronemann's "out-of-town" was Urbandale, a suburb connected to Des Moines. Ms. Bronemann also made internally contradictory statements. Ms. Bronemann stated on the one hand that she did not receive phone calls or messages, but also stated that she was not going to leave the birthday party and that she had contacted the store at 4:00 p.m. to confirm the evening clerk had arrived. Ms. Bronemann was intentionally dishonest when she asserted she had not received the phone calls or messages. Mr. English told Ms. Bronemann that her employment was on hold until she and Mr. English could meet in person with his supervisor, Lynnette Butt, to discuss the matter.

On October 24, 2017, Mr. English and Ms. Butt met with Ms. Bronemann. Mr. English reminded Ms. Bronemann that it was her responsibility as Store Manager to ensure that all shifts at Store Number 2 were covered. Ms. Bronemann responded that she had been "out-of-town" at a

birthday party and was not going to leave the party to go to work. Ms. Bronemann again dishonestly asserted that she had not received the phone messages, but again added that she had called the store at 4:00 p.m. to see whether the evening clerk had arrived.

In making the decision to discharge Ms. Bronemann from the employment, the employer considered prior attendance issues and associated reprimands.

Ms. Bronemann established an original claim for unemployment insurance benefits that was effective October 29, 2017. Ms. Bronemann received $2,457.00 in benefits for the seven weeks between October 29, 2017 and December 16, 2017. Git-N-Go is the sole base period employer in connection with the claim. On November 16, 2017, a Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Bronemann's separation from Git-N-Go. Mr. English participated in the fact-finding interview on behalf of the employer.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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 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).

There were a number of aspects to Ms. Bronemann's conduct in connection with the discharge-triggering incident that factored in the discharge decision. The employer considered Ms. Bronemann's failure to fulfill her duty as Store Manager by failing to take appropriate steps to ensure that all shifts were covered at her store and by failing to communicate with the employer regarding the staffing issue. Just as important, Ms. Bronemann was intentionally dishonest with the employer during the October 23 telephone call and again during the October 24 in-person meeting when she asserted she had not received the calls or messages and when she asserted she had been "out-of-town." Ms. Bronemann's misleading and dishonest statements fundamentally undermined the trust relationship that was essential in light of the nature of her position. Ms. Bronemann's misleading and dishonest utterances demonstrated an intentional and substantial disregard of the employer's interests. Ms. Bronemann's intentional dishonesty was sufficient to establish misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Bronemann was discharged for misconduct. Accordingly, Ms. Bronemann is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Bronemann must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Ms. Bronemann received $2,457.00 in benefits for the seven weeks between October 29, 2017 and December 16, 2017. This decision disqualifies her for those benefits. Accordingly, the

benefits Ms. Bronemann received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Ms. Bronemann is required to repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to Ms. Bronemann.

DECISION:

The November 17, 2017, reference 01, decision is reversed. The claimant was discharged on October 24, 2017 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid $2,457.00 in benefits for the seven weeks between October 29, 2017 and December 16, 2017. The claimant must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to the claimant.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs