IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CAROL L SCHMIDT
Claimant

HY-VEE INC
Employer

APPEAL NO. 16A-UI-13347-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/20/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Carol Schmidt filed a timely appeal from the December 9, 2016, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on a claims deputy's conclusion that Ms. Schmidt had been discharged on November 22, 2016 for loafing on the job. After due notice was issued, a hearing was started on January 9, 2017 and completed on January 10, 2017. Ms. Schmidt participated. Bruce Burgess of Corporate Cost Control represented the employer and presented testimony through Scott Wilkinson and Shane Olson. Exhibits 1 through 11, B, C and D were received into evidence.

ISSUE:

Whether Ms. Schmidt 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: Carol Schmidt was employed by Hy-Vee, Inc. as a full-time Senior Support Services Specialist in the employer's Information Technology (I.T.) department until November 22, 2016, when Scott Wilkinson, Assistant Vice President of Support Services, I.T., discharged her from the employment. Ms. Schmidt began her employment with Hy-Vee in 1999 and had been in the Senior Support Services Specialist position at least six years at the time of the discharge. Ms. Schmidt's duties involved assisting Hy-Vee store personnel in resolving computer hardware, software and networking problems. Ms. Schmidt was an hourly employee. Her final wage was $28.10 per hour. Ms. Schmidt performed her work duties at the employer's corporate office in West Des Moines. Shane Olson, Manager of Work Services, I.T., was Ms. Schmidt's immediate supervisor. Bryan Romig, Director of Support Services, was one step above Mr. Olson in the I.T. area's chain of command. Mr. Wilkinson was above Mr. Romig in the chain of command.

Ms. Schmidt recently received a performance review in June 2016. At that time, the employer noted that Ms. Schmidt had resolved 12.46 percent of the incoming calls for assistance during the preceding five months. The employer acknowledged that percentage as "an adequate number," but noted an expectation that Ms. Schmidt become a leader and resource to other I.T. staff. The employer noted a concern that Ms. Schmidt's socializing sometimes impacted her

productivity. The employer noted a goal of having Ms. Schmidt resolve 15 percent of the incoming calls.

At the beginning of October 2016, the employer decided to reduce the length of employee shifts from nine hours to eight hours and to make corresponding change to the break protocol. Prior to the change, employees worked a nine-hour shift with an hour lunch break. With the change, employees worked eight-hour shifts with a total of 30 minutes of paid break time during the shift. If an employee desired to exceed the 30 minutes of daily break time, the employee was required to clock out. The employer advised that the employer intended to use "the honor system" to manage compliance with the new break protocol. In connection with the change in shift-length and break policy, Ms. Schmidt's work hours went to 5:00 a.m. to 1:00 p.m., 6:00 a.m. to 2:00 p.m., or 9:00 a.m. to 6:00 p.m., pursuant to the I.T. department's rotating schedule protocol. Ms. Schmidt was also required to work 6:00 a.m. to 2:00 p.m. every sixth Saturday.

On November 7, 2016, Mr. Romig presided at a staff meeting wherein he reviewed the break policy that applied to the eight-hour shifts. The I.T. management team desired to review the policy with staff because the department was in the process of adding 11 new staff members. Ms. Schmidt was present for the meeting. At the time of the meeting, Mr. Romig distributed a copy of a 2012 policy statement regarding paid breaks. The policy was not specific to the shift length change implemented in October 2016. Rather the policy stressed that an employee could not be required to clock out for a break that was 30 minutes or less.

On November 11, 2016, Shane Olson sent an email message to Ms. Schmidt and another I.T. staff member in which he commended them for their recent hard work. Mr. Olson stated the following:

> Just wanted to say you both have been awesome this week. There has been a lot of things thrown at the core group with Training the new folks. Both of you have been extremely high energy over the past few weeks. Glad you are on our team!!
>
> Awesome Job!!

The final incident that triggered the discharge occurred on Monday, November 21, 2016. On that day, Ms. Schmidt started her shift at 6:00 a.m. Ms. Schmidt took a 10-minute break between 6:35 and 6:45 a.m. during which time she got an apple from the onsite produce area and a cup of tea. On that day, the employer was having a special Thanksgiving lunch for employees in the onsite cafeteria. At 11:11 a.m., Ms. Schmidt announced that she was going to lunch. Before she headed to the cafeteria, she briefly assisted another I.T. staff member. Ms. Schmidt left the I.T. area at 11:13 a.m. Ms. Schmidt returned to the I.T. area at 11:50 or 11:51 a.m. Mr. Olson noted Ms. Schmidt's arrival and the fact that she had taken longer than 30 minutes for lunch. At 11:51 a.m., Mr. Olson sent Ms. Schmidt an instant message asking whether she had clocked out for lunch. Ms. Schmidt replied, "No." Mr. Olson reported Ms. Schmidt's long lunch to Mr. Wilkinson. After her initial response to Mr. Olson's message, Ms. Schmidt sent another message advising that she had helped "Danny" before she left for lunch. Ms. Schmidt had been at lunch for 38 to 40 minutes. Ms. Schmidt had received no prior reprimands for violation of the employer's break policy.

In making the decision to discharge Ms. Schmidt from the employment, Mr. Wilkinson also considered a written reprimand he had issued to her on October 24, 2016 for unauthorized viewing of a non-work related video at her work station on Saturday, October 22, 2016. On that Saturday, Ms. Schmidt was scheduled to work from 6:00 a.m. to 2:00 p.m. shift. Ms. Schmidt was the only I.T. staff on hand other than Mr. Wilkinson. For that reason, Ms. Schmidt was not allowed to leave her work area to take a formal break. Mr. Wilkinson briefly left the I.T. area at about 9:30 a.m. He returned five minutes later and observed Ms. Schmidt closing a video she had been viewing on one of the three computer monitors at her work station. The video was a

non-work related fitness video. At the time of the reprimand on October 24, Mr. Wilkinson notified Ms. Schmidt that she had lost the privilege of limited non-work related Internet use and would thereafter be required to get permission before engaging in non-work related Internet use. There were no prior reprimands for Internet use. There was not non-work related Internet use after the October 24 reprimand.

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 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 weight of the evidence in the record establishes a violation of the employer's break policy at lunch time on November 21, 2016, when Ms. Schmidt exceeded her daily allotment of 30 minutes of paid break and failed to clock out. The employer presented insufficient evidence to support and prove the employer's allegation that there were other violations of the break policy. The weight of the evidence in the record establishes that the break issue on November 21, 2016 involved special circumstances pertaining to celebration of the Thanksgiving holiday. That does not excuse the violation, but does place it in context. The evidence fails to establish that Ms. Schmidt wantonly or substantially disregarded the employer's interests in connection with the break time concern.

The evidence also does not establish a wanton or substantial disregard of the employer's interests in connection with the momentary viewing of the video on October 22. That conduct involved a momentary error in judgment in the context of a shift without formal breaks.

The employer's assertion that there was an ongoing concern about Ms. Schmidt's productivity is squarely refuted by Mr. Olson's email message of November 11, 2016 in which he indicated appreciation for weeks of extraordinary effort.

The minor and isolated violations of protocol that factored in the discharge were individually and jointly insufficient to establish misconduct in connection with the employment that would disqualify Ms. Schmidt for unemployment insurance benefits. This conclusion is reinforced when one considers length of service to the employer and the absence of prior reprimands.

Ms. Schmidt was discharged for no disqualifying reason. Ms. Schmidt is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged.

DECISION:

The December 9, 2016, reference 01, decision is reversed. 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/rvs