IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHAYLA L SWAILES
Claimant

RET MANAGEMENT CORP
SUBWAY SANDWICHES & SALADS
Employer

APPEAL NO. 07A-UI-03640-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/04/07 R: 03
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Shayla Swailes filed a timely appeal from the March 30, 2007, reference 01, decision that the denied benefits. After due notice was issued, a hearing was held on May 10, 2007. Ms. Swailes participated personally and was represented by attorney Jay Schweitzer, who presented additional testimony through Deanna Reed, Nina Phillips, and Jan Ruekert. Kevin Thie, Owner and Supervisor, represented the employer and presented additional testimony through Scott Brant, Supervisor. Employer's Exhibits One through Six, Eight, and Ten were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Shayla Swailes was employed by RET Management, doing business as a Subway Sandwiches & Salads, as a part-time sandwich maker from November 12, 2005 until February 23, 2007, when Kevin Thie discharged her. The final incident that prompted the discharge occurred on February 22, 2007. Scott Brant, who supervisors multiple stores, had made arrangements with a supplier to deliver nine boxes of lettuce to the store where Ms. Swailes worked. The store ordinarily ordered five boxes of lettuce at a time. The employer needed the four extra boxes for one of its other stores. Mr. Brant did not tell the stores' employees or manager that he had ordered excess lettuce. When the lettuce arrived, Ms. Swailes was the employee at the store with the longest tenure. Two other employees, Karen Estrada and Brandon Bolye, were also working. The new store manager, Linda Zuniga, was not working at the time the lettuce arrived. Ms. Swailes was working in the front of the restaurant when the lettuce arrived and Ms. Estrada was working in the back of the restaurant. Ms. Swailes was familiar with the employer's ordering process and the quantity of items the store usually ordered. A chart listing the usual quantities was maintained at that store. When the delivery person delivered twice the normal amount of lettuce, Ms. Swailes and Ms. Estrada disagreed on whether the store should accept

or reject the extra lettuce. Ms. Swailes insisted that Ms. Estrada reject the extra lettuce. Ms. Swailes attempted to reach the store manager to resolve the matter, but the store manager was not available for her call. Ms. Estrada subsequently spoke with Ms. Zuniga, who came to the store. However, Ms. Zuniga knew nothing about the extra lettuce. When Mr. Brant arrived at the store the next day, he learned that the lettuce had been rejected. Ms. Zuniga and Ms. Estrada continue with the employer, but did not testify at the hearing. The employer had issued a warning to Ms. Swailes in September for being disrespectful to other employees. The employer deemed the disagreement over the lettuce another instance of Ms. Swailes being disrespectful to a coworker and discharged her.

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). 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 evidence in the record fails to establish, by a preponderance of the evidence, either intentional misconduct or negligence/carelessness on the part of Ms. Swailes in connection with the botched lettuce delivery. Though Ms. Estrada and the other employees involved in the incident continue their employment with the employer, the employer failed to present any testimony from those employees. The evidence in the record is insufficient to establish that Ms. Swailes behaved inappropriately towards her coworkers during the disagreement over the lettuce delivery. The evidence indicates Ms. Swailes was attempting to serve the best interests of the employer by adhering to the delivery quantity guidelines established for the store. The administrative law judge notes that the entire disagreement between Ms. Swailes and her coworkers could have been avoided if Mr. Brant had properly informed the staff of the unusual delivery.

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

DECISION:

The Agency representative's March 30, 2007, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw