IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

AMY L RICHTER
Claimant

ALGONA MARINE & SPORT INC
Employer

APPEAL NO. 17A-UI-01131-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/01/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Amy Richter filed a timely appeal from the January 24, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Ms. Richter was discharged on December 22, 2016 for conduct not in the best interest of the employer. After due notice was issued, a hearing was held on February 21, 2017. Ms. Richter participated in the appeal hearing and presented additional testimony through Scott Richter. The employer did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. The employer received proper notice of the hearing as indicated by the employer's submission of a copy of its hearing notice on February 10, 2017. Exhibits A, B and C were received into evidence.

After the hearing record had closed and the claimant and her additional witness had been excused from the hearing at 1:26 p.m., employer representative Chad Hall contacted the Appeals Bureau at 1:37 p.m. The administrative law judge returned Mr. Hall's call. At that time, Mr. Hall conceded that he had not read the hearing notice instructions that directed him to register a telephone number for the hearing. Mr. Hall had been in contact with the Appeals Bureau on February 10, 2017 to inquire about submitting exhibits for the hearing. Mr. Hall had indeed submitted proposed exhibits on February 10, 2017. Mr. Hall advised the administrative law judge that he assumed the Appeals Bureau had a phone number for him due to his participation in the fact-finding interview. Iowa Administrative Code rule 871-26.14(7)(b) and (c) provide as follows:

> b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire ex parte as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.
>
> c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

Pursuant to Iowa Administrative Code rule 871-26.14(7)(c), the administrative law judge concluded that the employer had not provided good cause to reopen the hearing record.

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: Amy Richter was employed by Algona Marine & Sport, Inc. as the full-time Office Manager/Accountant from August 10, 2016 until December 28, 2016, when owner Chad Hall discharged her from the employment. Mr. Hall was Ms. Richter's immediate supervisor. On December 21, 2016, Mr. Hall notified Ms. Richter of his decision to discharge her from the employment. At that time, Mr. Hall told Ms. Richter that was deferring the effective date of the discharge until he found a replacement for Ms. Richter. On December 28, 2016, Mr. Hall notified Ms. Richter that he did not need her to return for further work.

At the time Mr. Hall notified Ms. Richter on December 21 of his intent to discharge her from the employment, he told that the picture that was being painted was not a good one and that he could not get past it. Mr. Hall told Ms. Richter that things that had happened in the employment showed him that Ms. Richter would steal from the company in the future. Mr. Hall was referring to two matters wherein Ms. Richter's personal business transactions became comingled with the employer's business transactions and/or business finances.

One of the employer's concerns arose from purchases Ms. Richter had made at Bomgaars Supply during a lunch break. Ms. Richter had made certain that her personal purchase, dog food, was rung up separately from the purchase she made for the employer's business. Ms. Richter received separate receipts for her personal purchase and for the purchase for the employer's business. Ms. Richter understood that her personal purchase would be billed a Bomgaars account she shared with her husband, Scott Richter, under the business name of JDM Trucking. When Ms. Richter received and reviewed the Bomgaars Supply billing statement for Algona Marine & Sport, she noted that her personal purchase had been posted to the employer's account, not the business account belonging to Ms. Richter and her husband. Ms. Richter brought the matter to Mr. Hall's attention, assured Mr. Hall that similar mistakes would not be made in the future, and indicated that she would pay Bomgaars for the purchase. Ms. Richter ended up writing the employer's business a personal check to cover the cost of the dog food erroneously added to the employer's billing statement.

The second of the employer's concerns arose from Ms. Richter's role as a distributor of Doterra Oils. Sandy Hall, Chad Hall's mother and a co-owner of Algona Marine & Sport, Inc., asked Ms. Richter to order her some Doterra Oils products and put them on the company credit card the employer had issued to Ms. Richter. Ms. Richter did as requested. However, Ms. Richter's monthly personal purchase of Doterra Oils also ended up being erroneously billed to the company credit card. Ms. Richter wrote the employer a personal check to cover that portion of the Doterra Oils purchase that was for Mr. Richter.

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 employer did not appear for the hearing as scheduled and did not present any evidence to support the allegation that Ms. Richter was discharged for misconduct in connection with the employment. The evidence in the record establishes that the employer had legitimate concerns about the comingling of Ms. Richter's personal purchases with the employer's business accounts. However, the evidence in the record fails to establish that the two comingling was willful or that they were part of a pattern of carelessness and/or negligence that would indicate a willful disregard of the employer's interests. The employer's decision to notify Ms. Richter of the decision to discharge her from the employment, but to defer the effective date of the discharge, further suggests recognition on the part of the employer that the comingling incidents did not reflect an intent or attempt to steal from the employer.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Richter was discharged for no disqualifying reason. Accordingly, Ms. Richter is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The January 24, 2017, 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