product. The "seal bars" on the machine had to be properly maintained and changed to avoid burning through the plastic packaging material. If the "seal bars" were not properly maintained and/or changed, and failed during production, the production line would need to be halted. At some point in Mr. Fischer's employment, coworker Robert Keener became responsible for maintaining and changing the "seal bars." Mr. Fischer was concerned on more than one occasion that Mr. Keener failed to perform proper preventative maintenance on the "seal bars," increasing the risk of a prolonged shutdown during production if the "seal bars" failed. Though Mr. Keener had been assigned to look after the seal bars, Mr. Fischer continued to be assigned to care for the machines in the general work area, including the machine that contained the "seal bars."

The final incident that prompted the discharge occurred on August 1, 2005. Mr. Fischer removed "seal bars" from a machine he had been working on and took them to Mr. Keener's work area. Any work on the "seal bars" had to be completed before first-shift production work commenced. Mr. Keener did not perform the necessary work in a timely fashion, so Mr. Fischer commenced maintenance on the "seal bars." Mr. Keener became upset with Mr. Fischer and asserted that Mr. Fischer had interfered with Mr. Keener's documentation of the useful life of the "seal bars." Maintenance supervisor Albert Valdez witnessed part of the exchange between Mr. Keener and Mr. Fischer and reported the incident to maintenance manager George Gingrich.

On August 2, 2005, Mr. Gingrich advised Mr. Fischer that most or all of the third shift staff had contacted Mr. Gingrich to advise that Mr. Fischer was difficult to get along with. At the same time Mr. Gingrich advised Mr. Fischer that he was being discharged, Mr. Gingrich presented Mr. Fischer with an "Employee Warning Notice." The notice indicates there was a final incident on August 1, 2005. The content of the notice describes the incident as follows: "Employee is a disruption to others around him. Written up in the past for negative interactions w/other employees. Warned of possible termination, should problem persist." Mr. Gingrich had checked the box that designated the type of violation as "inappropriate behavior." In May 2005, Mr. Fischer had received reprimands resulting from heated exchanges with one or another coworker. The degree of Mr. Fischer's culpability with regard to those instances is not clear.

Subsequent to the discharge, the employer asserted that the basis of the discharge was willful damage to company property on August 1. However, Mr. Gingrich did not raise this allegation at the time he notified Mr. Fischer he was being discharged. In addition, Mr. Gingrich did not reference willful damage to company property on the "Employee Warning Notice" that documented the discharge.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Fischer was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since the claimant was discharged, 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 to 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).

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).

Human Resources Manager Elizabeth Billmeyer indicated at the start of the hearing that Maintenance Manager George Gingrich was not available for the hearing because he was ill. However, Mr. Gingrich was not a witness to the final incident that prompted the discharge and would only have provided testimony based on hearsay with regard to that incident. The more

direct and satisfactory evidence regarding the final incident would have been testimony from employee Robert Keener and/or Maintenance Supervisor Albert Valdez. The employer did not present such testimony despite the ability to do so.

The evidence in the record fails to establish a final incident of misconduct. Instead, the administrative law judge is presented with an allegation of misconduct not supported or corroborated by the evidence. The weight of the evidence in the record indicates that on August 1, 2005, Mr. Fischer was working satisfactorily and in furtherance of the employer's interests.

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

DECISION:

The Agency representative's decision dated August 24, 2005, reference 01 is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

jt/kjw