

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

HEATHER N LUMSDEN
Claimant

APPEAL NO. 18A-UI-07903-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KWIK TRIP INC
Employer

OC: 06/24/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Heather Lumsden filed a timely appeal from the July 16, 2018, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Lumsden was discharged on June 27, 2018 for conduct not in the best interests of the employer. After due notice was issued, a hearing was held on August 13, 2018. Ms. Lumsden participated. Alicia Endelman represented the employer. Exhibit A and Department Exhibits D-1 through D-8 were received into evidence.

ISSUE:

Whether Ms. Lumsden 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: Heather Lumsden was employed by Kwik Trip, Inc. as a full-time Guest Service Co-worker (clerk) in Waterloo from 2016 until June 27, 2018, when the employer's human resources personnel discharged her from the employment. Alicia Endelman, District Manager, notified Ms. Lumsden of the discharge decision.

On June 25, 2018, the employer's corporate communications center forwarded to Ms. Endelman an anonymous complaint the communications center had just received by telephone concerning Ms. Lumsden. The complainant had referenced Ms. Lumsden by her first name and had provided the store number where she worked. The male complainant stated that Ms. Lumsden had been sending unsolicited and unwelcome text messages and nude photographs to the complainant over the course of months, that the photographs were taken in the workplace, and that the complainant wanted the behavior to stop. The complainant asserted that his wife and children frequented the store where Ms. Lumsden worked. The complainant provided a telephone number where he could be reached. Ms. Endelman promptly made contact with the complainant, who identified himself as Patrick. Ms. Endelman did not get a last name for the complainant. The complainant provided to Ms. Endelman undated text messages and photos the complainant had received from Ms. Lumsden. The photographs

showed Ms. Lumsden in a state of undress. Two of the photos showed Ms. Lumsden with her breasts fully exposed. Another photo showed Ms. Lumsden's partially exposed buttocks. Ms. Endelman readily recognized Ms. Lumsden as the person in the photos and readily recognized the inside the workplace restroom as the place where the photos were taken. Ms. Lumsden had taken the photos with her cell phone. Each photo showed Ms. Lumsden in her work uniform with the company logo clearly visible. Two of the photos showed Ms. Lumsden's employee ID. Ms. Endelman forwarded the materials to the employer's human resources department.

On June 27, 2018, the human resources department notified Ms. Endelman of the company's decision to discharge Ms. Lumsden from the employment. The employer deemed taking and sending the photograph a violation of the employer's Code of Conduct. The employer reviewed the Code of Conduct with Ms. Lumsden at the start of her employment. The Code of Conduct begins with the following policy statement:

At Kwik Trip, Inc. we expect our co-workers to conduct themselves in a professional and respectful manner while dealing with other co-workers, guests, and vendors. Co-workers should maintain appropriate business decorum and avoid insubordinate behavior when dealing with members of the management team.

The Code of Conduct includes the following:

Other inappropriate behavior which will result in disciplinary action up to, and including termination, include, but not limited to:

1. Sexual Harassment/Harassment
7. Failure to abide by generally accepted notions of civility, including engaging in abusive, threatening, or violent behavior.
10. Inefficient performance of duties, incompetence, neglect of duty, loafing or horseplay.

On June 27, 2018, Ms. Endelman met with Ms. Lumsden for the purpose of discharging her from the employment. Ms. Lumsden initially denied that she had taken the photos. After Ms. Endelman told Ms. Lumsden she had the photos and had reviewed the photos, Ms. Lumsden conceded she had in taken the photos. Ms. Lumsden made no reference to when she had taken the photos.

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).

The weight of the evidence in the record establishes a discharge based on misconduct in connection with the employment. Ms. Lumsden acted with intentional and substantial disregard of the employer's interests when she took nude photos of herself at the workplace and while she was in her work uniform. The fact that Ms. Lumsden was in her clearly-identifiable work uniform associated the employer with the inappropriate conduct in a way that was detrimental to the employer and in a way that could have been significantly detrimental to the employer's reputation. The conduct in question violated multiple employer work rules. Regardless of what date or dates Ms. Lumsden took the photos, the conduct that triggered the discharge constituted a current act for unemployment insurance purposes because the conduct came to the employer's attention on or about June 25, 2018 and the employer promptly discharged

Ms. Lumsden from the employment two days later. Ms. Lumsden 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. Lumsden must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The July 16, 2018, reference 01, decision is affirmed. The claimant was discharged on June 27, 2018 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 employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs