

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JESSICA A HALL
Claimant

APPEAL NO. 13A-UI-01950-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PER MAR SECURITY & RESEARCH CORP
Employer

OC: 07/08/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 7, 2013, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on March 15, 2013. Claimant Jessica Hall did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Shauna Schroeder represented the employer. Exhibits One, Two, and Three 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: Jessica Hall was employed by Per Mar Security & Research Corporation as a full-time security officer from August 2012 until January 11, 2013, when Randy Mulder, Operations Officer, discharged her from the employment. Ms. Hall was assigned to the Tones manufacturing plant in Ankeny. Ms. Hall's duties included monitoring the main entrance to the Tones plant and her actual post was at the main entrance. Ms. Hall's work hours were midnight to 8:00 a.m., Monday through Friday. Ms. Hall's immediate supervisor was Site Supervisor Donald Lehman.

On January 11, 2013, the Tones Plant Manager contacted Mr. Mulder and alleged that he had entered the security office that day to find Ms. Hall inattentive to her duties. He alleged that Ms. Hall had her head down, was not sleeping, and that her acknowledgment of his presence was limited to raising her hand. He alleged that Ms. Hall was not monitoring the entrance to the plant. There had been no previous similar incidents. Ms. Hall subsequently denied the allegation that she had been inattentive to her duties. Ms. Hall asserted that when the Plant Manager had entered the office, she had been performing stretches that her doctor had directed her to perform. Ms. Hall had recently suffered personal injury requiring medical attention, but had been released to return to work without restrictions.

In making the decision to discharge Ms. Hall from the employment, the employer considered prior attendance and reprimands for attendance. The most recent absence that factored into the discharge was for the period of December 16-22.

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) alone. 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 has presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish disqualifying misconduct in connection with the employment. The employer did not present testimony at the hearing from anyone who had personal knowledge concerning the final incident that triggered the discharge. The employer's evidence concerning the final incident was limited to multiple-layered hearsay. In other words, Ms. Schroeder testified to what the plant manager allegedly told Mr. Mulder. The employer had the ability to present more direct and satisfactory evidence but elected not to do that.

Because the evidence fails to establish misconduct in connection with the final incident that triggered the discharge, the administrative law judge concludes that Ms. Hall was discharged for no disqualifying reason. Because the evidence fails to establish a *current act* of misconduct, the administrative law judge need not further consider the evidence concerning attendance matters from on or before December 22, 2012. Ms. Hall is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Hall.

DECISION:

The agency representative's February 7, 2013, reference 03,, decision is affirmed. 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/pjs