

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CAYLEIGH L WEIDNER
Claimant

APPEAL NO. 12A-UI-11760-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABM LTD
SERVICEMASTER GREEN
Employer

OC: 09/02/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 28, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 25, 2012. Claimant Cayleigh Weidner participated. Employer representative Greg Stearns provided a telephone number for the hearing, but was not available at that number at the time of the hearing and did not participate. Mr. Stearns contacted the administrative law judge after the hearing record had closed and the claimant had been excused. Mr. Stearns did not provide 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: Cayleigh Weidner was employed by ABM, Ltd., Servicemaster Green as a full-time day porter from 2010 until July 27, 2012, when Greg Stearns, human resources manager, discharged her from the employment. As a day porter, Ms. Weidner was responsible for cleaning and stocking restrooms at a client business. On July 27, Ms. Weidner notified Mr. Stearns that she had been convicted of possession of marijuana. The conviction was based on off-duty conduct that occurred away from the workplace. Ms. Weidner received an employee handbook, but was not aware of any work rule that subjected her to discipline or discharge based on her off-duty conduct. Mr. Stearns initially notified Ms. Weidner that she could not perform work at the client business' facility. Mr. Stearns then notified Ms. Weidner that she was discharged from the employment.

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).

Violation of a specific work rule, even off-duty, can constitute misconduct sufficient to disqualify a claimant from unemployment insurance benefits. See Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992). But the employer must have a work rule that covers the off-duty conduct.

The employer did not participate in the hearing and thereby did not present any evidence to establish misconduct *in connection with the employment*. The evidence the record fails to establish misconduct *in connection with the employment*. There is insufficient evidence in the record to establish that the employer had, during Ms. Weidner's employment, a work rule that subjected her to discipline or discharge based on off-duty conduct. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Weidner was discharged for no disqualifying reason. Accordingly, Ms. Weidner is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's September 28, 2012, reference 01, 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/kjw