

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JESSICA D BASDEN
Claimant

APPEAL NO. 07A-UI-04524-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MURPHY OIL USA INC
Employer

**OC: 04/01/07 R: 04
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

Murphy Oil filed a timely appeal from the April 23, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 21, 2007. Claimant Jessica Basden participated. District Manager Missi Santee represented the employer. With the agreement of the parties, the administrative law judge took official notice of the official Clerk of Court records maintained by the Iowa Judicial Branch and made available to the public at www.judicial.state.ia.us.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.
Whether the claimant was discharged for a “current act.”

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jessica Basden was employed by Murphy Oil as a part-time cashier from October 19, 2006 until January 29, 2007, when the employer’s corporate office directed Manager Glenda Jenkins to discharge her. Ms. Jenkins left the employer the month following Ms. Basden’s discharge. At the time Ms. Basden applied for a job with the employer, she completed a written application. The application asked whether Ms. Basden had been convicted a felony. Ms. Basden left this question blank. Ms. Basden had a conviction, but she was uncertain whether it was a felony. Ms. Basden has in fact not been convicted of a felony. The application also asked whether Ms. Basden had been convicted of theft, fraud, or a violent crime. Ms. Basden had been convicted of simple misdemeanor theft a few months prior to commencing the employment, based on an offense alleged to have been committed in 2004. Ms. Basden answered yes to the question of whether she had a theft conviction. The application indicated on its face that any misrepresentation would result in discharge. The employer representative did not present a copy of the application as an exhibit for the hearing and did not have a copy of the application available to her for the hearing. Ms. Basden discussed the circumstances of her prior theft conviction with Ms. Jenkins at the time she interviewed for a position and Ms. Jenkins hired her in spite of the conviction.

Ms. Basden subsequently applied to become an assistant manager. Ms. Basden again discussed her prior theft conviction with Ms. Jenkins. At some point during or before January 2007, the employer's corporate office conducted a criminal history check in connection with Ms. Basden's application for the assistant manager position. The employer's corporate office erroneously concluded that Ms. Basden had a felony conviction and had withheld information on her application. The employer then directed Ms. Jenkins to discharge Ms. Basden.

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.

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).

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 evidence in the record fails to establish a “current act” upon which a discharge for misconduct must be based. See 871 IAC 24.32(8). The evidence indicates that Ms. Jenkins was aware of the prior theft conviction at the time Ms. Basden commenced her employment in October 2006. The evidence indicates that Ms. Jenkins elected not to take any further action on the information. The evidence indicates that the employer continued to delay taking any action on the criminal conviction until January 2007. Even then, it is unclear how long the employer’s corporate office had the results of the criminal history check before advising Ms. Basden that the contents thereof subjected her to discharge. Because there was no “current act,” the administrative law judge concludes that Ms. Basden was discharged for no disqualifying reason. Accordingly, Ms. Basden is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged for benefits paid to Ms. Basden.

Even if the evidence had demonstrated a “current act,” the evidence fails to support the employer’s assertion of a felony conviction. In addition, the evidence fails to establish any willful withholding of information.

DECISION:

The Agency representative’s April 23, 2007, 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/pjs