IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LINDA E VAN ZOMEREN
Claimant

ABM SECURITY SERVICES INC
Employer

APPEAL NO. 12A-UI-05903-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/29/12
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Linda Van Zomeren filed a timely appeal from the May 16, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was started on June 13, 2012 and concluded on June 18, 2012. Ms. Van Zomeren participated personally and was represented by paralegal Jim Hamilton. Deniece Norman of Employer's Edge represented the employer and presented testimony through Brenda Shepard, Cindy McCoy, Bob Feltman, Susan Abdullah, and Esco Campbell. Exhibits One through 10 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: The employer provides security services and restroom attendant services at the Cargill plant in Ottumwa. Linda Van Zomeren was employed by ABM Security Services as a full-time service attendant/security officer from 2010 until April 30, 2012, when the employer discharged her from the employment.

When Mr. Van Zomeren worked as a restroom service attendant, the required uniform was a green long sleeve shirt and khaki slacks. The "uniform" did not contain any markings identifying Ms. Van Zomeren as an ABM employee. Ms. Van Zomeren was expected to wear the shirt tucked into the slacks. This policy was not enforced prior to April 24, 2012. Ms. Van Zomeren was expected to wear this same outfit when she transitioned toward the end of her shifts to security officer duties. Ms. Van Zomeren sometimes wore an ABM Security jacket while she was on duty. The jacket contained markings that identified her as an ABM employee.

On April 24, 2012, Ms. Van Zomeren participated in a mandatory employee safety meeting. During the meeting the employer reviewed various ABM policies, including the dress code and company uniform policies. The written policies provide as follows:

Dress Code – ABM employees are expected to meet the dress code criteria at all times. This includes cleanliness of his/her uniform and his/her person. If an employee does not meet the minimum dress code standards, they may be sent home to obtain proper work attire, and may also have their paycheck deducted for the time they did not work. ABM employees are expected to take proper care of their uniforms and report any wear damage to their supervisor. ABM will try within reason to work with employees who will have a special dress code based on disability, religion, or race [sic].

Company uniform – When on duty officers are expected to wear the company uniform, with no part of the uniform being worn with civilian attire. Also, not part of the official security uniform will be worn off duty except immediately to and from your duty station. All security uniforms will be accompanied by a high shine black leather shoe or boot. All officers will wear black standard length socks. A black uniform tie will be work at all times October 1 through May 1, unless otherwise directed. At any time when a tie is not worn, a solid white or black crew neck tee shirt will be worn.

A related policy pertained to personal grooming and provided, in relevant part, as follows:

Personal Grooming – Female Employees

a. **Hair** – Hair will be neatly cut, clean, away from face and must not interfere with vision or be a safety hazard. No designs or initials can be cut into hair. Hair longer than shoulder length my [sic] be neatly pulled back and restricted into a braid, bun or ponytail.

During the April 24 meeting, the employer reinforced that ABM staff were to wear their shirts tucked into their slacks at all times while on duty. Ms. Van Zomeren preferred to wear her shift untucked.

On the morning of April 25, Security Director Brenda Shepard observed Ms. Van Zomeren with her shirt untucked at a time when Ms. Van Zomeren was on duty. When Ms. Shepard pointed out the dress code issue, Ms. Van Zomeren said she did not know if enforcement of the policy has started yet. Ms. Shepard affirmed that it had.

On the evening of April 25, 2012, Assistant Security Director Cindy McCoy observed Ms. Van Zomeren with her shirt completely untucked. Ms. Van Zomeren also did not have her hair pulled back. Ms. McCoy encountered Ms. Van Zomeren before 7:00 p.m. Ms. Van Zomeren was not scheduled to start work until 7:30 p.m. Ms. Van Zomeren was outside the guard shack at the entrance of the plant. In other words, Ms. Van Zomeren had not yet entered the facility to start her shift. The employer's written policy did not address this situation, where an employee was on Cargill grounds, but not yet on duty. Ms. McCoy told Ms. Van Zomeren that she needed to tuck in her shirt and put her hair up. Ms. McCoy responded, "Okay," and did as directed.

On April 26, Security Supervisor Susan Abdullah observed Ms. Van Zomeren with her shirt completely untucked at a time when Ms. Van Zomeren was on duty. Ms. Abdullah reported the mater to Ms. Shepard. Thereafter, Ms. Shepard issued a directive to the supervisors to send Ms. Van Zomeren home if she was again observed with her shirt untucked.

On April 27, Security Supervisor Esco Campbell observed Ms. Van Zomeren with her shirt untucked at a time when she was on duty and sent her home early. The employer subsequently discharged Ms. Van Zomeren on April 30 for repeated failure to follow the dress code after being repeatedly directed to do so.

None of the incidents that factored in the discharge occurred while Ms. Van Zomeren was assigned to work as a service attendant in the mega restroom used by Cargill employees. The service attendant work did not require untucking the shirt for any reason. Aside from the incident outside the facility on the evening of April 25, all of the incidents occurred at a point in Ms. Van Zomeren's shift where she was done working in the mega restroom and was working as a security officer or on her way to her security officer post. Ms. Van Zomeren had the ability and opportunity to tuck in her shirt prior to leaving the mega restroom area.

While the employer now cites attendance as a factor in the discharge, the discharge was not in fact based on attendance and attendance was not discussed with Ms. Van Zomeren at the time of discharge. Ms. Van Zomeren's most recent absence had been on April 5, was due to illness, and was properly reported to the employer. All but one of Ms. Van Zomeren's earlier absences was due to illness and properly reported to the employer. The exception was February 1, when Ms. Van Zomeren overslept and the employer had to replace her with another employee.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

The employer reasonably expected Ms. Van Zomeren to look neat and presentable when she was on duty at the Cargill plant. The written policy limits itself to on duty situations. When Ms. Van Zomeren was on duty, she functioned as an ABM agent and her appearance reflected on ABM. Ms. Van Zomeren clearly understood as of April 24 meeting that she was to have her shirt tucked in at all times when she was on duty. This was not an unreasonable expectation on the employer's part. Ms. Van Zomeren did not want to wear her shirt tucked in and entered on a course of conduct where she would wear her shirt untucked unless directed to tuck it in. The weight of the evidence fails to support the employer's assertion that Ms. Van Zomeren should have known the employer's policies required her to have her uniform shirt tucked when she was still off-duty and outside the Cargill facility. But the other incidents indicate a repeated failure to follow the employer's directive to wear the shirt tucked in. The weight of the evidence fails to support Ms. Van Zomeren's assertion that her work as a restroom attendant caused her to have her shirt untucked *after* she had completed her restroom attendant duties. Ms. Van Zomeren's conduct was insubordination and misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Van Zomeren was discharged for misconduct. Accordingly, Ms. Van Zomeren is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Van Zomeren.

DECISION:

The Agency representative's May 16, 2012, reference 01, decision is affirmed. The claimant was discharged for misconduct. 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 allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/pjs