

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

NYIBOL B DEPINY
Claimant

AEROTEK INC
Employer

APPEAL NO. 20A-UI-06197-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/12/20
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 9, 2020, reference 01, decision that allowed benefits to the claimant provided she met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on April 13, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on July 15, 2020. Claimant Nyibol Depiny participated and presented additional testimony through Garang Yai. Trent Rockelman, On-premise Customer Support Specialist, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO and KPYX).

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: Nyibol Depiny began her employment with Aerotek, Inc. in August 2019 and began a full-time temp-to-hire work assignment at Hoch at that time. Ms. Depiny's work hours were 5:00 a.m. to 3:30 p.m., Monday through Thursday. Brody Eischeid, Account Recruiting Manager, was an Aerotek on-site representative at the Hoch facility and had supervisory authority over Ms. Depiny's employment. Jason (JT) Taylor was the Hoch supervisor who functioned as Ms. Depiny's immediate supervisor as she performed her daily duties. Ms. Depiny's duties at Hoch involved operating a machine, packing and assembly.

Ms. Depiny last performed in the Hoch assignment on April 8, 2020. Minutes before Ms. Depiny was supposed to end her shift, Ms. Depiny and a trainee were working together to operate a machine that ordinarily required three workers to operate. The trainee was not able to maintain the normal pace. Ms. Depiny's work that the machine required timing her movements to match the movements of the machine. The trainee's inability to keep up interfered with this. As Ms. Depiny reached to perform a required task, her movement was sufficiently delay that the machine caught her hand. Coworkers in the vicinity had to stop the machine and hold the

machine steady in order to free Ms. Depiny's hand. Ms. Depiny experienced some cuts on her hand, but was not seriously injured. At the end of her shift, Ms. Depiny went home for the day with the intention for reporting for work the next day. At 5:00 p.m., Mr. Eischeid telephoned Ms. Depiny. Mr. Eischeid told Ms. Depiny that the incident had been reported to him and that he needed to do additional investigation. Mr. Eischeid directed Ms. Depiny to remain off work until he notified her of a decision regarding whether she would be allowed to return to the assignment.

On April 13, 2020 Mr. Eischeid told Ms. Depiny that Hoch would not allow her to return to assignment. Mr. Eischeid directed Ms. Depiny to apply for unemployment insurance benefits. Mr. Eischeid told Ms. Depiny that Aerotek's business was currently slow and that he would be in contact about a placement in a different assignment when business picked up.

Ms. Depiny had no prior safety incidents in the Hoch assignment, but other concerns had been raised. On April 1, 2020, Mr. Eischeid told Ms. Depiny that he had received a report that Ms. Depiny had been on her cell phone on the production floor. Workers were allowed to use their cell phone on the production floor for the purpose of playing music via a wireless speaking located on the production floor. Workers were not allowed to use their cell phones on the production floor to call, text or for purpose other than playing music. Ms. Depiny had used her cellphone to play music, but had not used it for any of the prohibited purposes. Ms. Depiny had been absent on or about February 27, 2020 due to illness and with proper notice to the employer.

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 evidence in the record establishes an April 13, 2020 non-disqualifying discharge from the Hoch assignment that was effectively also non-disqualifying discharge from the Aerotek employment. The employer presented insufficient evidence to rebut Ms. Depiny's testimony regarding the incident that triggered her removal from the assignment and the employment. The weight of the evidence fails to establish that Ms. Depiny did anything intentional, careless, or negligent to cause the April 8, 2020 workplace accident. The evidence indicates instead that Ms. Depiny was working in short-staffed conditions with an inexperienced coworker and that these factors were the primary cause of the workplace accident. The employer also presented insufficient evidence to rebut Ms. Depiny's testimony or to provide misconduct in connection with the alleged cell phone incident. The February 27, 2020 absence was due to illness, was properly reported, was an excused absence under the applicable law, and not misconduct in connection with the employment. See Iowa Administrative Code rule 871-24.32(7) (regarding discharge for excessive unexcused absences). Ms. Depiny is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The June 9, 2020, reference 01, decision is affirmed. The claimant was discharged on April 13, 2020 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

A handwritten signature in cursive script that reads "James E. Timberland". The signature is written in black ink on a light gray rectangular background.

James E. Timberland
Administrative Law Judge

July 22, 2020
Decision Dated and Mailed

jet/scn