IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

KAREN S WHITMIRE
Claimant

AT&T MOBILITY SERVICES LLC
Employer

APPEAL NO. 18A-UI-08975-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/22/18
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Administrative Code rule 871-24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 15, 2018, reference 02, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on July 18, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on September 13, 2018. Claimant Karen Whitmire participated. Tanis Burrell of Equifax represented the employer and presented testimony through Matt Roe. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1, 5, 8, 11, 15, 19 and 20 into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the discharge was based on a current act.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Karen Whitmire was employed by AT&T Mobility Services, L.L.C. as a full-time Customer Service Specialist from 2013 until July 18, 2018, when the employer's human resources personnel discharged her from the employment. From the late February or early April 2018, Matt Roe, Team Manager, was Ms. Whitmire's immediate supervisor. Ms. Whitmire's duties involved receiving inbound customer services calls, resolving the customer's service issue, and attempting to sell additional services to the customer during the call. Ms. Whitmire would handle about 30 customer calls per day. The calls would be routed to Ms. Whitmire via the employer's automated call routing system. The employer's work rules prohibited customer service representatives from "camping" or "lurking" on calls to avoid taking additional calls from the automated call routing system. Ms. Whitmire was at all relevant times aware of this prohibition against work avoidance. Ms. Whitmire's duties frequently involved forwarding the customer to another department. Such call forwarding duties included "warm transfers." In a

warm transfer, Ms. Whitmire was supposed to stay on the line until a person from the relevant department answered and then introduce the customer to the department representative before disconnecting from the call. Ms. Whitmire also handed "cold transfers," where she was supposed to transfer the customer and then hang up. During the last year of Ms. Whitmire's employment, the employer made Ms. Whitmire's work more challenging by prohibiting use of pen and paper and prohibiting using an equivalent electronic notepad to store relevant information for subsequent use to resolve a customer's service issue. Instead, Ms. Whitmire would have to make electronic notes as quickly as possible concerning the call she was handling and would often be "knocked out" of the call before she finished making necessary notes.

The final incident that triggered the employer's decision to discharge Ms. Whitmire from the employment concerned her handling of a particular "cold transfer" on June 30, 2018. When Ms. Whitmire transferred the call, she heard a message that indicated someone would answer within a minute. Ms. Whitmire stayed on the line to ensure that the customer was connected with the next department. In the meantime, Ms. Whitmire entered information into the computer concerning other recent calls, including one she had been "knocked out of" to receive the new call in question. When Ms. Whitmire realized she had been on the line for upward of five minutes after she initiated the cold transfer, she disconnected from the call out of fear she would be deemed to have camped or lurked on the call. On July 1, 2018, Mr. Roe listened to the call in question as part of a random review of Ms. Whitmire's calls and concluded that Ms. Whitmire had indeed camped or lurked on the call in violation of the employer's call handling policies. On July 2, Mr. Roe met with Ms. Whitmire to discuss the call. Mr. Roe confirmed that Ms. Whitmire understood what the employer deemed camping/lurking and was familiar with the prohibition against camping/lurking. During this meeting, Mr. Roe said nothing to Ms. Whitmire to indicate that she could or would face discharge from the employment in connection with her handling of the call. On July 2, Mr. Roe reported the matter to the employer's human resources personnel. The human resources personnel reviewed Ms. Whitmire's disciplinary history and conferred with the employer's legal counsel. On July 18, 2018, Mr. Roe notified Ms. Whitmire that she was discharged from the employment for work avoidance. Between July 2 and July 18, 2018, Ms. Whitmire had continued to report for work and perform her regular duties without incident.

The next most recent conduct that factored in the discharge occurred on May 2, 2018. The employer alleges that Ms. Whitmire used a "racial slur" when speaking with a customer. Ms. Whitmire did not in fact use a racial slur and did not knowingly employ any offensive language. Rather, Ms. Whitmire attempted to establish rapport with a customer who lived near the NASCAR Pocono Racetrack in Pennsylvania and in the process asked him whether he had "a little bit of hillbilly in him." Ms. Whitmire's use of this colloquialism stemmed from her own interest and NASCAR and her belief that her interest stemmed in part from her having "a little bit of hillbilly" in her. The customer was not offended, but Mr. Roe was concerned when he reviewed the call and issued a written warning to Ms. Whitmire in connection with the matter.

The next most recent conduct that factored in the discharge concerned a call Ms. Whitmire handled on March 31, 2018 and Mr. Roe's conclusion that she had camped/lurked on the call. Ms. Whitmire had lingered on a cold transfer call for eight minutes before disconnecting from the call. Mr. Roe reminded Ms. Whitmire of the camping/lurking policy. Though Mr. Roe's supervisor recommended that Ms. Whitmire be discharged in connection with the incident, the employer ultimately did not issue formal discipline in connection with the matter.

The next most recent conduct that factored in the discharge concerned Ms. Whitmire facilitating a customer's request for contact information for the company president by performing a Google search for the customer to provide publicly posted contact information. The customer was frustrated about an interaction with one of the employer's retail stores and had already spoken to the department to which Ms. Whitmire would otherwise have routed the call.

The employer considered one additional earlier matter from January 2018, wherein Ms. Whitmire failed to properly verify a caller's authority to receive information concerning an account. Ms. Whitmire concedes that she failed to properly verify the caller's credentials to receive information concerning the account.

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(4).

The evidence in the record establishes a July 18, 2018 discharge that was not based on a current act. The conduct that triggered the discharge occurred on June 30, 2018 and came to the employer's attention on July 1, 2018. Mr. Roe spoke with Ms. Whitmire on July 2, 2018, but said nothing regarding whether the incident could or would result in Ms. Whitmire being discharged from the employment. Ms. Whitmire continued to report for work and perform her usual duties without knowledge that her employment was in jeopardy as a result of the June 30 call. Seventeen days after the concern came to Mr. Roe's attention, and 16 days after Mr. Roe spoke to Ms. Whitmire regarding the concern, the employer notified Ms. Whitmire for the first time that her handling of the June 30 call could and would result in her discharge from the employment. The employer failed to provide a reasonable basis for the long delay between the employer's knowledge of the final incident and the employer's notice to Ms. Whitmire that the conduct could trigger her discharge from the employment. Neither the human resources personnel's need to review the disciplinary history nor their need to confer with the legal department provides a reasonable basis for the extended delay. Because the evidence fails to establish a current act of misconduct, the discharge would not disqualify Ms. Whitmire for unemployment insurance benefits. Because the evidence does not establish a current act, the administrative law judge need not further consider whether the final incident or the earlier incidents involved misconduct. Nonetheless, the administrative judge concludes the at the final incident involved an error in judgment, not an intent to manipulate the employer's automated call routing system, and not misconduct in connection with the employment. Ms. Whitmire is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The August 15, 2018, reference 02, decision is affirmed. The claimant was discharged for no disqualifying reason. The discharge was not based on a current act. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/rvs