IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOYCE E SCHLARBAUM
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 10A-UI-09728-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/13/10
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Joyce Schlarbaum filed a timely appeal from the July 6, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 25, 2010. Ms. Schlarbaum participated. Dan McKinney, Store Manager, represented the employer. Exhibits D, E and F 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: Joyce Schlarbaum was employed by Wal-Mart as a full-time customer service manager from 1995 until July 11, 2010, when Dan McKinney, Store Manager, discharged her from the employment for selling alcohol to a customer in violation of the employer's restricted merchandise policy.

On June 5, 2010, Ms. Schlarbaum was the customer service manager on duty when two young ladies went through cashier Ashleigh Coy's lane wanting to purchase alcohol. One young lady provided an ID that indicated she was 24 years old. The other young lady did not have an ID, but asserted she was 22 years old and of legal age to purchase alcohol. The employer's policy prohibited alcohol sale under the circumstances. Ms. Schlarbaum, as a member of the management team, had completed training regarding the alcohol sales policy 10 times and was well familiar with the requirements of the policy. Ms. Coy had declined to make the sale. Ms. Coy summoned Ms. Schlarbaum to assist in the matter. The young lady without the ID asserted that she was 22 years old and asserted that she had dealt with Ms. Schlarbaum before. Ms. Schlarbaum thought she recognized the young lady without the ID *from a cigarette sales transaction a month earlier.* Ms. Schlarbaum did not actually know the young lady without the ID. Ms. Schlarbaum overrode the cash register system prompts that indicated the sale should not go through and Ms. Schlarbaum authorized the sale of alcohol to the pair of young ladies without requiring presentation of the second ID.

On June 8, Store Manager Dan McKinney received an anonymous telephone call from a concerned citizen who alleged a young lady had been bragging at a local party about purchasing alcohol under the legal age at the Wal-Mart store. On June 8, Mr. McKinney reviewed the computer record of the transaction and video surveillance of the transaction. Mr. McKinney then interviewed Ms. Schlarbaum, who admitted to authorizing the alcohol sale in the absence of an ID from the second young lady.

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).

The weight of the evidence establishes that Ms. Schlarbaum knowingly disregarded the employer restricted merchandise sales policy on June 5, 2010 and authorized sale of alcohol to a pair of young ladies, one of whom did not present an ID and who was most likely under legal age to purchase alcohol. Ms. Schlarbaum was well aware of the employer's policy and was the person charged at that time specifically with enforcing the policy. Ms. Schlarbaum clearly *did not know* the young lady without the ID. Whether Ms. Schlarbaum knew the young was of no significance, because Ms. Schlarbaum knew full well that would not provide a basis for ignoring the employer's alcohol sales policy. Ms. Schlarbaum knowingly violated the policy and exposed the employer—along with herself and Ms. Coy—to potential liability. Ms. Schlarbaum continues to minimize her actions and goes so far as to characterize Ms. Coy, who was intent on following the employer's policy, as a "drama queen" specifically because Ms. Coy was intent on following the employer's policy. This position on the part of Ms. Schlarbaum further substantiates Ms. Scharbaum's disregard for the employer's interests in connection with the incident that prompted her discharge.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Schlarbaum was discharged for misconduct. Accordingly, Ms. Schlarbaum 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. Schlarbaum.

DECISION:

The Agency representative's July 6, 2010, 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.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/pjs