

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

SHARON N CARLSON
Claimant

APPEAL NO. 18A-UI-07852-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CROSSMARK INC
Employer

OC: 06/10/18
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 11, 2018, reference 01, 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 June 9, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on August 10, 2018. Claimant Sharon Carlson participated. Davis Walsh represented the employer and presented additional testimony through Avis Getting and Nicole Williamson. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1, 4, 5, 6 9, 11 and A through Y into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

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

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: Crossmark, Inc. supplies product demonstration workers to Sam's Club. Sharon Carlson was employed by Crossmark as a part-time Event Specialist assigned to the Sam's Club in Sioux City from 2014 until June 9, 2018, when Crossmark's human resources personnel discharged her from the employment. Avis Getting, Crossmark Club Supervisor, notified Ms. Carlson of the discharge decision. Ms. Getting became Crossmark Club Supervisor and Ms. Carlson's immediate supervisor effective May 1, 2018. The final incident that triggered the discharge occurred on May 25, 2018 and came to the employer's attention that same day. On May 25, 2018, Rob Saul, a Sam's Club customer service manager alleged to Ms. Getting that Ms. Carlson had raised her voice to Mr. Saul and Sam's Club manager Zachary Wyatt while demanding that they move a pallet of product in the back room that Ms. Carlson concluded was blocking her path and interfering with her ability to set up her demonstration cart. After

Ms. Getting spoke to Mr. Saul, she spoke to Mr. Wyatt and a kitchen produce lead worker. Ms. Getting then spoke to Ms. Carlson. Ms. Carlson conceded that she had asked the Sam's Club managers to move the pallet of freight, but denied that she had raised her voice or been otherwise unpleasant during the process. After Ms. Getting spoke with Ms. Carlson, Ms. Getting spoke with her supervisor, John Barney, Marketing Manager. The pair then contacted Crossmark's human resources department. Ms. Carlson continued to report for work and perform her regular duties until June 9, when Ms. Getting notified her that she was discharged from the employment. Prior to June 9, the employer had not said anything to Ms. Carlson to indicate that Ms. Carlson's employment was in jeopardy as a result of the May 25, 2018 interaction with the Sam's Club managers. The employer considered earlier concerns when making the decision to discharge Ms. Carlson from the employment. The next most recent specific incident that factored in the discharge occurred fall 2017.

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 discharge for no disqualifying reason. The evidence in the record fails to establish a discharge based on a current act. The conduct that triggered the discharge occurred on May 25, 2018 and came to the employer's attention that same day. The evidence establishes that the employer completed its investigation of the matter that same day. The employer said nothing to Ms. Carlson at that time to indicate that the alleged incident could or would result in discharge from the employment. Ms. Carlson continued to report for work and do her job until June 9, when the employer notified her that she was discharged from the employment. The 15-day delay between the employer's knowledge of the alleged conduct and notice to Ms. Carlson that the alleged incident could and would result in discharge from the employment was unreasonable. In addition, the employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to rebut Ms. Carlson's testimony and to prove that Ms. Carlson acted inappropriately on May 25, 2018. The administrative law judge notes that the employer had the ability to present testimony through any one of the Sam's Club employees present for the alleged May 25 incident, but the employer elected not to present testimony from those people. Ms. Carlson is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The July 11, 2018, reference 01, decision is affirmed. The claimant was discharged on June 9, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs