

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

SAMANTHA L BURKART
Claimant

APPEAL NO. 18A-UI-11108-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEST LIBERTY FOODS LLC
Employer

OC: 09/02/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Samantha Burkart filed a timely appeal from the October 2, 2018, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Burkart was discharged on September 5, 2018 for "engaging in too much horseplay while on duty." After due notice was issued, a hearing was held on November 29, 2018. Ms. Burkart participated personally and was represented by attorney Steven Ort. Monica Dyer represented the employer. Exhibits 1 through 23 were received into evidence. The administrative law judge concluded that the Exhibit 10 is relevant and does not contain privileged information that would exclude it from consideration.

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: Samantha Burkart was employed by West Liberty Foods, L.L.C. as a full-time slicer technician until September 5, 2018, when Jean Spiesz, Human Resources Manager, discharged her from the employment. The incident that triggered the discharge occurred on August 30, 2018. On that day, one of Ms. Burkart's coworkers, Mat-Tia Trejo, reported to Ms. Spiesz and to Production Supervisor Raymond Whitfield that Ms. Burkart had hit her on the leg. Ms. Burkart had indeed hit Ms. Trejo on the lower leg. Ms. Spiesz conducted an investigation into the matter that included review of video surveillance that showed Ms. Burkart hitting Ms. Trejo as she walked by Ms. Trejo as well as Ms. Trejo's response to the unwelcome contact. Ms. Spiesz interviewed the several employees who were working in the area at the time of the incident. When Ms. Spiesz interviewed Ms. Burkart, Ms. Burkart asserted that her action in hitting Ms. Trejo had been horseplay. Ms. Burkart and one or more other employees reported to Ms. Spiesz that horseplay was common amongst the employees who regularly worked on Line 11. While the workers in Ms. Burkart's area did indeed regularly engage in mild horseplay, Ms. Burkart's act of hitting Ms. Trejo was not mere horseplay. Ms. Trejo had not perceived Ms. Burkart's act as mere horseplay. Ms. Burkart hit Ms. Trejo hard enough to evoke an immediate "ow" utterance

from Ms. Trejo, hard enough to prompt Ms. Trejo to immediately turn to see what or who had hit her, and hard enough to prompt Ms. Trejo to immediately complain to the employer.

At the start of Ms. Burkart's employment, the employer provided Ms. Burkart with an employee handbook. Ms. Burkart acknowledged in writing her receipt of the handbook, her obligation to familiarize herself with content of the handbook, and her obligation to adhere to the policies set forth in the handbook. The handbook set forth "Major Rule Violations" that would subject an employee to discipline up to and including discharge from the employment. The list of violations included the following:

Fighting, attempting bodily harm or any other disorderly conduct, including threats, intimidation or interference with other team members, including distraction of other team members by unnecessary shouting or demonstrations.

....

Any form of rowdiness, mischief, running or throwing of objects or any other kinds of horseplay.

The employer considered Ms. Burkart's disciplinary history in making the decision to discharge her from the employment. There had been no prior discipline for horseplay or for assaultive behavior.

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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

Iowa Code section 708.1 provides, in relevant part, as follows:

708.1 Assault defined.

1. An assault as defined in this section is a general intent crime.
2. A person commits an assault when, without justification, the person does any of the following:
 - a. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.

The weight of the evidence in the record establishes a discharge for misconduct in connection with the employment. The weight of the evidence supports the conclusion the employer reached through its investigation, that Ms. Burkart assaulted Ms. Trejo on August 30, 2018. Ms. Burkart's assertion that the incident was mere horseplay, consistent with a history of mild horseplay, is inconsistent with the video record of the incident and is not credible. Ms. Burkart

initially asserted in her testimony that she could not determine whether she or Ms. Trejo were depicted in Exhibits 13, 14 and 15, the photographic sequential record of the incident as it unfolded. Ms. Burkart was well familiar with the area in question, well familiar with the parties present, and well familiar with the incident that triggered the discharge. The weight of the evidence establishes that Ms. Burkart's initial assertion that she did not recognize herself in the photos was intentionally misleading and not credible. Ms. Burkart's assertion that she merely engaged in mild horseplay consistent with a history of horseplay is inconsistent with the response she provoked in Ms. Trejo, both the immediate physical and verbal response to being hit, as well as the immediate complaint to the employer. While the employer's evidence concerning the matter in question consisted almost entirely of hearsay, the documented statements and photo record of the incident were sufficient to establish the reliability of the various components. This conclusion is further supported by Ms. Burkart's testimony that Ms. Spiesz accurately documented Ms. Burkart's verbal statement concerning the matter. Ms. Burkart's conduct on August 30 was a knowing and intentional violation of the two work rules in question. The conduct demonstrated an intentional and substantial disregard of the employer's interest.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Burkart was discharged for misconduct in connection with the employment. Accordingly, Ms. Burkart is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Burkart must meet all other eligibility requirements. The employer's account shall not be charged.

DECISION:

The October 2, 2018, reference 01, decision is affirmed. The claimant was discharged on September 5, 2018 for misconduct in connection with the employment. 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 amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs