

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AZRA AHMETOVIC
Claimant

APPEAL NO. 13A-UI-11695-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FBG SERVICE CORPORATION
Employer

OC: 09/01/13
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 October 10, 2013, reference 02, decision that allowed benefits. After due notice was issued, a hearing was started on November 12, 2013. Claimant Azra Ahmetovic did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate on November 12. Tom Kuiper of Equifax Workforce Solutions represented the employer and presented testimony through Robyne Holtman. Ms. Ahmetovic contacted the Appeals Section on November 12, 2013 and provided good cause to reopen the record. The hearing was restarted on November 13, 2013. Ms. Ahmetovic participated. Tom Kuiper of Equifax Workforce Solutions represented the employer and presented testimony through Robyne Holtman. Bosnian-English interpreter Azra Sikiric assisted with the hearing. The administrative law judge took official notice of the agency's administrative record (DBRO) of benefits disbursed to the claimant.

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: The employer is a commercial cleaning enterprise. Azra Ahmetovic was employed by FBG Service Corporation as a cleaning specialist from 2005 until August 20, 2013, when Robyne Holtman, Internal Manager, discharged her from the employment for alleged dishonest filing of a worker's compensation claim. On August 12, 2013, Ms. Ahmetovic suffered injury to her back in connection with her employment for FBG Service Corporation. Ms. Ahmetovic immediately reported the incident to her immediate supervisor, Area Manager Frank Aldridge. Ms. Ahmetovic required immediate medical attention and was transported to a medical facility by a person who worked at the business where Ms. Ahmetovic was cleaning at the time of the injury. Ms. Ahmetovic had collapsed onto the floor as a result of pain shooting down her back and down her legs as she was hoisting a mop bucket to dump water. Earlier the same day, Ms. Ahmetovic had felt a sudden, but much less significant pain, when she working her other cleaning job at DMACC.

Ms. Ahmetovic is Bosnian-speaking person and has limited English skills. When Robyne Holtman, FBG Internal Manager, interviewed Ms. Ahmetovic about the workplace injury, she understood Ms. Ahmetovic to deny being hurt at DMACC. In fact, Ms. Ahmetovic simply communicated to the employer as best she could that the significant injury and pain of that day had occurred while she was working for FBG. Ms. Ahmetovic in no manner attempted to mislead the employer about the circumstances of her work injury. The employer's worker's compensation carrier seized on the DMACC incident as a basis for denying liability in connection with the workplace injury that had occurred while Ms. Ahmetovic was working for FBG. The employer in turn seized on the carrier's self-interested conclusion as a basis for concluding, erroneously, that Ms. Ahmetovic had been dishonest with the employer about how and when she was injured.

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 in the record establishes that the employer was quick to find malfeasance and dishonesty on the part of Ms. Ahmetovic where none existed. The weight of the evidence indicates that Ms. Ahmetovic did indeed suffer a work injury while performing work for FBG and that whatever happened earlier in the day at DMAACC was insignificant by comparison. The weight of the evidence establishes that the employer essentially retaliated against Ms. Ahmetovic for filing a worker's compensation claim by firing her from the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Ahmetovic was discharged for no disqualifying reason. Accordingly, Ms. Ahmetovic is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's October 10, 2013, reference 02, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs