

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BONITA K WALLER
Claimant

APPEAL NO. 16A-UI-06197-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KWIK TRIP INC
Employer

OC: 05/01/16
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 May 26, 2016, 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 an agency conclusion that the claimant had been discharged on April 22, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on June 27, 2016. Claimant Bonita Waller participated. Darcy Mahoney represented the employer and presented additional testimony through Kimberley Keil. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and took official notice of the fact-finding materials.

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: Bonita Waller was employed by Kwik Trip, Inc., as a Food Service Leader until April 22, 2016, when the employer discharged her for violation of employer's food quality standards. The final incident that triggered the discharge occurred on April 2, 2016, when Ms. Waller failed to replace a soup that had been made the day before. The employer's policy required that the soup discarded and replaced with freshly made soup after 24 hours after the soup was made and placed on the retail sales floor. On April 2, 2016, Shift Leader Paula Baker noted that the soup had not been changed from the day before. Ms. Baker knew the soup had not been changed because she had made the particular soup on April 1. Ms. Baker noted the issue in the computer-based management communication log. The store leader/store manager and the Food Service District Leaders/managers had access to the communication log. On April 12, 2016, Ms. Baker brought the April 2 issue to the attention of Darcy Mahoney, Food Service District Leader. On that day, Ms. Mahoney reviewed surveillance video and the soup log to confirm that Ms. Waller had not replaced the soup on April 2, 2016. On April 20, 2016,

Ms. Mahoney met with Ms. Waller to discuss the April 2 incident. No one had spoken to Ms. Waller about the alleged April 2 violation prior to April 20. On April 22, the employer notified Ms. Waller that she was discharged from the employment. Prior to April 22, no one had notified Ms. Waller that her employment was in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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).

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).

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 Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

The evidence in the record establishes that the final incident of alleged misconduct that triggered the discharge occurred on April 2, 2016 and came to the attention of a member of management that same day. That member of management, Shift Leader Paula Baker, noted the incident in the computer-based manager communication log that same day. No one took any other action on the matter until April 12, 2016, when Ms. Mahoney happened to be in the store and Ms. Baker brought the matter to her attention. Ms. Mahoney took steps that same day to review surveillance and the soup log, but took no other significant action on the matter until April 20, 2016, when she met with Ms. Waller. Even then, Ms. Mahoney did not notify Ms. Waller that her employment might be in jeopardy. That information was conveyed on April 22, when employer discharged Ms. Waller for an alleged violation that occurred 20 days earlier.

The discharge was not based on a current act. Because the discharge was not based on a current act, the administrative law judge need not further consider whether the April 2 incident constituted misconduct. Because the final incident that prompted the discharge was not a current act, the administrative law judge need not further consider whether the alleged misconduct from early March constituted misconduct. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Waller was discharged for no disqualifying reason. Accordingly, Ms. Waller is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The May 26, 2016, reference 01, decision is affirmed. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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