

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LYNN M DECKER

Claimant

APPEAL NO. 06A-UI-10635-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DUBUQUE COUNTY

ATTN COUNTY AUDITOR

Employer

**OC: 10/1/06 R: 04
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

Dubuque County filed a timely appeal from the October 25, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 28, 2006 at the Dubuque Workforce Development Center. Claimant Lynn Decker participated personally and was represented by Attorney Douglas Henry. Mr. Henry presented additional testimony through General Assistance Office Case Worker Tammy Henry. Mary Ann Specht, Dubuque County Personnel Director, represented the employer. At the request of the employer, the administrative law judge took official notice of the Agency's administrative file. Exhibits One, Three through Six, A and B were received into evidence. Department Exhibit D-1 was marked for identification purposes.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits. She was not.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lynn Decker was employed by Dubuque County on a full-time basis from February 14, 2000 until September 29, 2006, when Mary Ann Specht, Dubuque County Personnel Director, discharged her from the employment. At the time of the discharge, Ms. Decker held the title of Clerk II in the Dubuque Child Support Recovery Office. Ms. Decker's immediate supervisor was Nancy McGinnis. Ms. McGinnis is still employed by the County, but did not testify at the hearing. On July 3, 2006, Ms. Decker had exercised her rights under a collective bargaining agreement to transfer into the Clerk II position. Prior to the transfer, Ms. Decker had worked primarily in the Dubuque County Zoning Department and carried the title of Clerk IV.

The employer based its decision to discharge Ms. Decker on her failure to perform to the employer's expectations during a "90-day probationary period" in the Child Support Recovery Office. Ms. Decker had minimal familiarity with Child Support Recovery law or the Child Support Recovery Office's procedures prior to transferring to a position in that department. While

Ms. Decker worked in the Zoning department, she had primarily performed general clerical duties. In the new position, the employer expected Ms. Decker to assume responsibility for 50 percent of the Child Support Recovery Office's customer service functions. Ms. Decker's time and training in the Child Support Recovery Office revealed that she lacked several skills the employer deemed necessary for her to successfully discharge her new duties. Prior to the end of the "90-day probationary period," Supervisor Nancy McGinnis advised the County Personnel Director that she believed Ms. Decker would be unable to master her new responsibilities even if the probationary period were extended. Though Ms. Decker had not been a model employee for Dubuque County during her lengthy employment, Ms. Decker did put forth a good faith effort to master her new responsibilities. Though the transfer to the new position was on its face a transfer to a lower ranking position, the duties of the new position differed substantially from Ms. Decker's former position and the learning curve was steep.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Decker was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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). 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 evidence in the record establishes that Ms. Decker performed to the level of her ability in the new position, but was unable to perform to the employer's satisfaction. Mere failure to perform to the employer's satisfaction is not misconduct. See 871 IAC 24.32(1)(a). The employer asserted that Ms. Decker's attitude or demeanor hindered her progress in the new position. The employer had the ability to present testimony from Ms. McGinnis and/or others to support its assertions of bad faith, but elected not to present such more direct and satisfactory evidence. The administrative law judge concludes that such evidence would have exposed further deficiencies in the employer's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976). The evidence presented by the employer fails to prove, by a preponderance of the evidence, willful or deliberate disregard of the employer's interests or recurrent negligence or carelessness indicating equal culpability. See 871 IAC 24.32(1)(a). In addition, the evidence fails to provide a “current act” that might serve as a basis for disqualifying Ms. Decker for benefits. See 871 IAC 24.32(8).

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

DECISION:

The Agency representative's October 25, 2006, reference 01, 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