

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

BARBARA J TAYLOR
Claimant

THE BON-TON DEPARTMENT STORES INC
Employer

APPEAL 15A-UI-01389-LT
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 01/04/15
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(8) – Current Act of Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from the January 22, 2015 (reference 01) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on February 27, 2015. Claimant participated. Employer participated through assistant store manager Tracy Killpack and store manager Taffy Johnson. Employer's Exhibit One (fax pages 5 through 41) was received.

ISSUES:

Was the claimant discharged for a current act of disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a cosmetic counter manager from 1991, and was separated from employment on December 10, 2014 when she was discharged for falsifying her time card on November 8, 2014. On November 8 claimant arrived at 11:23 a.m. and altered the time record to reflect she arrived at 11:15 a.m. Killpack found out about the alteration on November 8 and conferred with loss prevention to research when claimant came through the employee entrance. The information was returned on November 12. She sent the information to corporate human resource regional director in Des Moines. On November 22 he gave her advice to talk with claimant and gave her authority to terminate the employment. Killpack prepared termination documents and met with claimant on December 10 for the first time about the incident. Claimant admitted at hearing that she knowingly changed the time card to show she was not late because she knew another incident of tardiness would result in termination.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no current act of misconduct.

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, (8) provide:

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).

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. EAB*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

The employer's waffling on the chronology of the investigation and authorization from human resources to the interview meeting and then the termination diminishes the witnesses' credibility. The employer suspected the time card alteration on the day it occurred, November 8, 2014 but did not notify claimant of the prospective dischargeable situation until 26 days later. Where three people involved in the meeting work full-time, that the employer could not find an earlier meeting date is not reasonable. Nor is the delay at the regional human resources level. Although the claimant did engage in a final act of misconduct by falsifying her time report on November 8, 2014 since the employer knew of the incident the same day, did not advise the claimant it was an issue that would be investigated until 23 days later on the day she was fired, the act for which the claimant was discharged was no longer current. Because the act for which the claimant was discharged was not current and the claimant may not be disqualified for past acts of misconduct, benefits are allowed.

DECISION:

The January 22, 2015 (reference 01) unemployment insurance decision is affirmed. Claimant was not discharged for a current act of job-related misconduct. Benefits are allowed, provided she is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

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