IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOSEPH R BRENKE, SR
Claimant

TARGET CORPORATION
Employer

APPEAL NO. 10A-UI-02362-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/17/10
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Joseph Brenke filed a timely appeal from the February 8, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 1, 2010. Mr. Brenke participated. Katie Hurt represented the employer and presented additional testimony through Tim Carr and Matt Stolba.

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: Joseph Brenke, Sr., was employed by Target Corporation as a logistics team member from April 2007 until January 18, 2010, when the employer discharged him from the employment for violating the employer's harassment policy. Mr. Brenke had received a copy of the policy at the start of his employment. In August 2009, the employer had reprimanded Mr. Brenke for violating the policy after Mr. Brenke made unwanted contact with a female cashier by putting his arms around her. The final incident that prompted the discharge occurred on December 24, 2009, but did not come to the attention of the management team until January 10, 2010, when Tim Carr, Executive Team Leader for Guest Experience, overheard two employees discussing the December 24, 2009 incident. The employer commenced an investigation into the matter that involved interviews with the affected parties and review of video surveillance of the December 24, 2009 incident. Mr. Brenke had gone up to a female cashier, put his arms around her and kissed her on the neck. The incident occurred at the front lanes with other cashiers present. The female cashier involved in the incident was one of the people Mr. Carr overheard discussing the matter on January 10, 2010. The employer's harassment policy also included an anti-retaliation provision. But after the employer interviewed Mr. Brenke about the matter, Mr. Brenke made contact with the female cashier involved and made one or more comments to her about the matter.

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).

Despite the employer's failure to present a copy of the surveillance video and failure to provide witness testimony from the persons directly involved in the events that triggered the discharge, there is sufficient uncontroverted evidence in the record to establish that Mr. Brenke knowingly violated the employer's harassment policy on December 24, 2009. Mr. Brenke does not dispute that he put his hand on the cashier at the front lanes and does not dispute that he kissed the cashier on the neck. A reasonable person would find such conduct to be intimate in nature and inappropriate in the context in which it occurred. The weight of the evidence indicates that the female cashier was still concerned enough about the incident to talk about it on January 10, 2010. This suggests the contact was indeed unwanted and that the conduct was indeed sexually harassing in nature. Mr. Brenke had already been warned about such conduct just a few months earlier, but continued with the conduct. Despite the shortcomings of the employer's case and the preference for more direct and satisfactory evidence, the administrative law judge concludes there is sufficient evidence in the record to establish intentional disregard of the interests of the employer that rose to the level of misconduct.

The incident that triggered the discharge came to the employer's attention on January 10, 2010. This prompted a timely investigation that included interviews with affected parties, review of video surveillance equipment, and upper management review prior to a decision to discharge the claimant. The weight of the evidence establishes a current act based on the date when the conduct came to the attention of the employer and the employer's reasonable progression toward discharging the claimant eight days later.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Brenke was discharged for misconduct. Accordingly, Mr. Brenke is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Brenke.

DECISION:

The Agency representative's February 8, 2010, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not charged.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

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