

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

COREY L BISHER
Claimant

APPEAL NO. 12A-UI-10664-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TARGET CORPORATION
Employer

OC: 08/05/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Corey Bisher filed a timely appeal from the August 24, 2012, reference 01, decision that denied benefits. A hearing was set for October 1, 2012 and notice to the parties was mailed on September 11, 2012. Mr. Bisher did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. The employer also did not respond to the hearing notice instructions to provide a telephone number for the hearing, but submitted a letter, dated September 20, 2012 in lieu of participating in the hearing. The document, submitted by TALX on behalf of the employer states: "The employer is not participating in the hearing. They request to stand on the record as all information was previously provided for this case."

The administrative law judge took official notice of the agency administrative file documents submitted for and generated in connection with the August 23, 2012 fact-finding interview.

ISSUE:

Whether the claimant was suspended or 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: Corey Bisher was employed by Target Corporation as a full-time warehouse worker from May 2011 until July 23, 2012, when he was suspended pending an outside law enforcement investigation into missing merchandise.

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).

Iowa Administrative Code section 871 IAC 24.32(9) provides as follows:

Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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 employer waived participation in the appeal hearing and thereby failed to present any evidence to meet the employer's burden of proving misconduct in connection with the employment. The administrative file documents submitted for and generated in connection with the fact-finding interview indicate an *allegation* of misconduct, but provide no proof of misconduct in connection with the employment. The lower decision that found disqualifying misconduct was in error.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Bisher was discharged for no disqualifying reason. The discharge was effective July 23, 2012. Mr. Bisher is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Bisher.

DECISION:

The Agency representative's August 24, 2012, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The discharge was effective July 23, 2012. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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