IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHERLONDA Q BUNCH
Claimant

FLYING J INC
Employer

APPEAL NO. 09A-UI-00041-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/02/08 R: 03
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 24, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 14, 2009. Claimant Sherlonda Bunch participated and presented additional testimony through Dwayne Appling. Lori Smith, Kitchen Manager, represented the employer.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Sherlonda Bunch was employed by Flying J, Inc., in Evansdale as a full-time hostess/quick food service employee from October 31, 2007 until October 30, 2008, when General Manager Gail Anderson discharged her from the employment. In addition to performing hostess duties, Ms. Bunch prepared pizzas and operated a cash register.

The employer discharged Ms. Bunch because of the length of her fingernails. Throughout the employment, Ms. Bunch's fingernails extended beyond the end of her finger approximately three-eighths of an inch. Ms. Bunch kept her fingernails clean and professionally manicured. Ms. Bunch wore work gloves, as required, when handling food. Ms. Bunch's fingernails did not interfere with work and did not present a public health issue. The employer regarded Ms. Bunch as a valued employee. The length of Ms. Bunch's fingernails did not become an issue until October 2008, when a new area manager became General Manager Gail Anderson's superior. The new manager wanted Ms. Anderson to enforce a "policy" whereby an employee's fingernails could not extend more than one-fourth inch beyond the end of the employee's fingers. The employer had not previously enforced such a policy in the restaurant where Ms. Bunch worked. The employer had not provided Ms. Bunch with a handbook that contained a fingernail length policy.

On or about October 20, Ms. Anderson conducted a meeting at which she told employees they would need to comply with the new fingernail length policy. Ms. Bunch had just paid a professional manicurist to do her nails. Approximately a week after the October 20 meeting, Ms. Anderson advised Ms. Bunch and some other employees that they would be given an additional week to comply with the policy. Ms. Bunch objected to new policy and decided against cutting her nails to the one-fourth inch length. On October 30, 2008, Ms. Anderson discharged Ms. Bunch for failing to comply with the new policy. At the time of discharge, Ms. Bunch asked the employer for a employee handbook so that she could review the fingernail policy. The employer did not have a handbook in the restaurant for Ms. Bunch to review. Ms. Bunch obtained an employee handbook from the convenience store area of the employer's business and reviewed the fingernail policy set forth therein. The handbook contained a policy regarding maintaining clean fingernails, but made no reference to fingernail length.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

While the decision to discharge Ms. Bunch from the employment was within the discretion of the employer, the evidence in the record fails to establish misconduct in connection with the employment that would disqualify Ms. Bunch for unemployment insurance benefits. The weight of the evidence indicates that Ms. Bunch maintained the same fingernail length throughout her employment and that the employer was aware of her fingernail length throughout the employment. The evidence indicates that Ms. Bunch performed her work duties in an appropriate fashion, complied with applicable food safety standards, and that the length of her fingernails did not interfere in any way with her work performance. The weight of the evidence indicates that the employer's fingernail length policy was either brand new or that the employer had neglected to advise employees of the policy and had neglected to enforce the policy until October 20, 2008. The employer's decision to establish and/or enforce a fingernail length policy would be reasonable if the policy was necessary to address a public health concern or if the employee's fingernail length interfered with work performance. However, the employer has not stated in this proceeding that either of these was the underlying purpose of the policy. Under the circumstances of this case, a reasonable person in Ms. Bunch's position could conclude that the employer's new policy, or newly announced and/or enforced policy, was arbitrary and unreasonable. The administrative law judge concludes that Ms. Bunch had good cause for declining to cut her nails to one-quarter inch length.

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

DECISION:

The Agency representative's December 24, 2008, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw