

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ELIZABETH J HERBRANDSON
Claimant

APPEAL NO. 08A-UI-09798-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EMPLOYMENT CONNECTIONS INC
Employer

**OC: 06/29/08 R: 01
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

Employer filed a timely appeal from the October 20, 2008, reference 05, decision that allowed benefits. After due notice was issued, a hearing was held on November 6, 2008. Claimant participated. Jim Kitterman, Secretary, represented the employer and presented testimony through Jeff Merryman, Sales Manager, and Joy Sheely, Staffing Coordinator. Exhibits One, Two, and Three were received into evidence.

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: The employer is a full service employment agency. Elizabeth Herbrandson established her employment relationship with Employment Connections on August 1, 2007. Ms. Herbrandson initially worked out of the employer's Spirit Lake branch. On August 2, 2008, Ms. Herbrandson commenced working out of the employer's Spencer branch. Ms. Herbrandson's final work assignment was a full-time production position at Landmark Productions, a frozen food processing facility. Ms. Herbrandson's duties included working on the food processing line, boxing product, and completing various cleaning duties as assigned. Ms. Herbrandson's supervisors at Landmark Productions were Production Leads Jeff Buchan and Kristy Linn.

Ms. Herbrandson's assignment and employment ended on September 18, 2008, when Sales Manager Jeff Merryman and Staffing Coordinator Joy Sheely discharged her from her work assignment and from the employment. On September 18, Landmark Productions Plant Manager Mike Lamb contacted Mr. Merryman with a complaint about Ms. Herbrandson. Mr. Lamb alleged that on that day Production Lead Jeff Buchan had directed Ms. Herbrandson to stop doing dishes and to clean the floor with a squeegee. Mr. Lamb alleged that Ms. Herbrandson initially refused to comply with the directive and said, "No, I'm doing dishes." Mr. Lamb alleged that Ms. Herbrandson attempted to have another worker clean the floor. Mr. Lamb alleged that when Mr. Buchan insisted that Ms. Herbrandson clean the floor, that she

slammed the head of squeegee on the floor as she began to clean the floor. Mr. Lamb further alleged that Ms. Herbrandson had taken an extended break earlier in the day and had argued with Production Lead when the Production Lead pointed it out.

After Mr. Merryman received the complaint from Mr. Lamb, he and Staffing Coordinator Joy Sheely went to the Landmark Production plant and met with Mr. Lamb and Mr. Buchan, who reiterated the allegations contained in the initial complaint. Mr. Merryman and Ms. Sheely then met with Ms. Herbrandson for the purpose of discharging her from the assignment and the employment. Ms. Herbrandson had in fact been washing dishes at the time Mr. Buchan initially gave the directive to clean the floor with the squeegee. Ms. Herbrandson did in fact attempt to have another worker clean the floor so that she could continue washing dishes. Ms. Herbrandson had complied with Mr. Buchan's directive after Mr. Buchan insisted she clean the floor. Ms. Herbrandson had not in fact slammed the squeegee head on the floor, but had shaken the water off the squeegee and one would need to in the course of using the squeegee to clean the floor. With regard to the alleged extended break, Ms. Herbrandson had gone to break late, returned with other employees, and was confronted by Production Lead Christy Linn, who asserted that Ms. Herbrandson had taken an extended break. When Ms. Herbrandson denied the allegation, the Production Lead erroneously concluded that she was being argumentative.

Employment Connections had issued one prior reprimand to Ms. Herbrandson on August 18, 2008. The reprimand was based on Ms. Herbrandson's failure to follow the established absence reporting procedure with regard to absences on August 6 and 11.

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).

The employer failed to produce any testimony from individuals who were firsthand witnesses to the September 18, 2008 incidents. The administrative law judge concludes that the employer had the ability to present such testimony, but elected to rely entirely upon hearsay evidence. With regard to Mr. Buchan's directive that Ms. Herbrandson stop washing dishes and clean the floor, the employer had presented insufficient evidence, and insufficiently direct and satisfactory evidence, to prove that Mr. Buchan's directive was reasonable under the circumstances. The

weight of evidence establishes that Ms. Herbrandson was in fact engaged in washing dishes at the time and that other workers were present and available to clean the floor. The employer had failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to prove that Ms. Herbrandson's initial refusal or failure to comply with the directive was unreasonable under the circumstances. In any event, the evidence indicates that Ms. Herbrandson did in fact subsequently comply with the directive and cleaned the floor. The employer has failed to produce sufficient evidence, and sufficiently direct and satisfactory evidence, to prove that Ms. Herbrandson slammed the squeegee head on the floor. The employer has failed to produce sufficient evidence, and sufficiently direct and satisfactory evidence to prove that Ms. Herbrandson took an extended break earlier in the day.

Based on the evidence in the record, the administrative law judge concludes that the evidence fails to establish an incident of insubordination on September 18 or any other misconduct on September 18. In any event, the evidence fails to establish any recurrent refusal follow reasonable directives. The prior attendance matters were attendance matters only and did not involve insubordination.

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

DECISION:

The Agency representative's October 20, 2008, reference 05, 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