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

GLENNA R BIRKLE
Claimant

APPEAL NO. 10A-UI-14902-NT

ADMINISTRATIVE LAW JUDGE
DECISION

KWIK SHOP INC
Employer

Original Claim: 10/03/10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated October 25, 2010, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice was issued, a telephone hearing was held on December 7, 2010. The claimant participated personally. The employer participated by Ms. Connie McMorran, store manager.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Glenna Birkle was employed by Kwik Shop, Inc. as a full-time clerk from December 21, 2009, until July 28, 2010, when she was discharged from employment. Ms. Birkle was paid by the hour. Her immediate supervisor was Connie McMorran.

The claimant was discharged after a "secret shopper" report indicated that the claimant had not followed required company "scripting" by greeting the secret shopper on July 27, 2010, and had not followed scripting requirements by offering the customer a "plus card" or by offering additional purchase options. The report also indicated that the facility needed mopping and that portions of shelving needed stocking.

Ms. Birkle had been warned on June 25, 2010, when she had not welcomed a district manager or followed the additional scripting. An additional warning had been given to the claimant on July 21, 2010, for failure to follow scripting. Because the July 27, 2010, incident was the third incident where it was alleged the claimant had not followed scripting, a decision was made to terminate Ms. Birkle from her employment.

On both July 21, and July 27, 2010, Ms. Birkle was on duty but was outside the store facility itself performing other duties. The claimant did not have the opportunity on those dates to greet

the "secret shopper" or to offer additional sales or a company "plus card." Prior to being discharged, the claimant had not been warned or counseled about failure to perform shift duties.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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 may not necessarily be serious enough to warrant the 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 App. 1992).

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 upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

The evidence in the record establishes that during the most recent "secret shopper" visits, Ms. Birkle was not inside the facility and thus did not have the opportunity nor the obligation to issue a welcome to the patron or to offer additional sales or the opportunity for a plus card. The claimant was engaged in performing side duties outside the building on each occasion and thus did not intentionally disregard her employer's interests or the standards of behavior that the employer had a reasonable right to expect of its employees under the provisions of the Iowa Employment Security Act. Misconduct sufficient to warrant the denial of unemployment insurance benefits has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's decision dated October 25, 2010, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

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Terence P. Nice
Administrative Law Judge

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Decision Dated and Mailed

kjw/kjw