

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT J FOLEY
Claimant

APPEAL NO. 10A-EUCU-00245-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BL MURRAY CO
Employer

**Original Claim: 11/09/08
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 March 22, 2010, reference 07, decision that allowed benefits. After due notice was issued, a hearing was held on May 12, 2010. The claimant participated. Jan Meyer represented the employer, and presented additional testimony through Gerald Clothier and Benard Murray. Exhibits One through Five 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: Robert Foley was employed by BL Murray Company as a full-time commissioned salesperson from November 2009 until February 5, 2010, when the employer discharged him because his sales were not sufficient to pay for his position or make a profit for the employer. The employer sells janitorial supplies. Mr. Foley had a significant background in selling janitorial supplies. Mr. Foley had previously worked for a much larger competitor and had to wait to go to work for the employer until after he had satisfied the terms of the non-compete agreement with the prior employer. Mr. Foley found it very difficult to persuade the customers he marketed to on behalf of the former employer that they should switch to buying product from the new employer. Mr. Foley's production and efforts to build a customer base were further hindered by the worse-than-usual 2009-2010 winter season. Mr. Foley shared a geographical area, Iowa, with another salesperson who had been with the employer longer.

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).

The weight of the evidence fails to establish malfeasance on the part of Mr. Foley. The evidence indicates instead that he simply could not perform to the level needed to justify his

continued employment and to turn a profit for the employer. A discharge based on these factors would not disqualify Mr. Foley for unemployment insurance benefits.

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

DECISION:

The Agency representative's March 22, 2010, reference 07, decision is affirmed. The claimant was discharged for no disqualifying reason. 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

jet/kjw