

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PAMELA J MCALLISTER
Claimant

APPEAL NO. 08A-UI-07982-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABILITIES UNLIMITED INC
Employer

**OC: 08/10/08 R: 02
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 August 29, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 7, 2008. Claimant Pamela McAllister participated and presented additional testimony from Bill Blanchard. Attorney Michelle Waller represented the employer and presented testimony from Board President Ernie Knolls and Board Vice President Wilford Roberts. Exhibits One, Two, and Three, A, and B 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 non-profit agency that provides services to mentally and/or physically handicapped consumers. The employer's program includes a workshop where clients refurbish merchandise that the employer later sells to the public at its store. Pamela McAllister was employed by Abilities Unlimited from March 31, 1993 until July 22, 2008, when the Board of Directors discharged her from the employment. Board Attorney Lynn Baise and Board Vice President Wilford Roberts carried out the discharge. During the last three years of the employment, Ms. McAllister was the full-time Administrative Assistant/Production Manager.

Ms. McAllister's duties included purchasing bulk merchandise from a supplier. The employer's clients would refurbish the merchandise and the employer would then sell the merchandise at its store. The merchandise consisted of items from several retail chains that had been rejected by the retailer as damaged or unsellable goods. In early June 2008, Ms. McAllister purchased several pallets of merchandise from the supplier. At the time of the purchase, the employer's clients had no merchandise to work on in the employer's workshop. Board Vice President Wilford Roberts participated in the discussion leading up to the purchase and approved the purchase on behalf of the Board. The supplier told Ms. McAllister and Mr. Roberts that the pallets in question contained a higher percentage than usual of merchandise that was

unsellable. For this reason, the merchandise was offered to the employer at a cost that was lower than usual. Mr. Roberts approved the \$3,000.00 purchase price with this in mind. The Board was subsequently disappointed with the percentage of unsellable merchandise and blamed Ms. McAllister for the purchase. The employer was able to refurbish some of the merchandise and placed it for sale at its store.

In early July 2008, Ms. McAllister approached Board President Tom Mowrer to get Board approval to place workshop supervisor Richard Seich on a two-week paid vacation. Mr. Mowrer told Ms. McAllister that he would discuss the request with the other Board Members and get back to her. The Board delayed getting back to Ms. McAllister. After Mr. Seich drafted a resignation letter, Ms. McAllister contacted the Board about the vacation request. Board Vice President Wilford Roberts then told Ms. McAllister that the Board wanted to put off the request a while longer because it "might have a legal issue." Mr. Roberts subsequently notified Ms. McAllister that she should tell Mr. Seich that the Board had approved a two-week vacation, but that he did not need to return to work at the end of the vacation period. Ms. McAllister discussed this further with Mr. Roberts and the Board changed its position on ending Mr. Seich's employment. Ms. McAllister notified Mr. Seich that the Board had approved his vacation and Mr. Seich schedule a vacation for the end of July. Ms. McAllister was discharged before Mr. Seich's scheduled vacation time. One of the reasons the Board attorney cited for discharging Ms. McAllister was her alleged insubordination by failing to put Mr. Seich on vacation.

In July 2007, Abilities Unlimited was sanctioned by the Department of Human Services (DHS) for several deficiencies that DHS had identified in its programming or services. DHS directed Abilities Unlimited to take several corrective action steps. The corrective action steps were to include adopting new policies. At the time of discharge, the Board attorney cited as part of the basis for the discharge Ms. McAllister's alleged failure to complete paperwork related to an accreditation process the employer needed to undergo as part of the corrective action steps. The Board attorney had given Ms. McAllister the CARF worksheet(s) to complete. In May 2008, Ms. McAllister had conducted staff meetings to discuss CARF Standards with employees. Ms. McAllister had then provided CARF worksheet(s) to the new acting Executive Director under the belief that he would take further action on the materials.

At the end of April 2008, the Board reprimanded Ms. McAllister for being too "mouthy" and insubordinate when addressing the Board Members. The Board thought that Ms. McAllister was again insubordinate and disrespectful during a June 13, 2008 meeting when Ms. McAllister raised employee benefit issues during a meeting the Board had called to introduce the new Executive Director.

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).

The weight of the evidence indicates that Abilities Unlimited had many systemic problems during Ms. McAllister's employment. These included multiple communication breakdowns

between the Board and staff, as well as frequent position changes on the part of the Board. The weight of the evidence indicates that the systemic problems played a significant role in the Board's decision to discharge Ms. McAllister from the employment. The Board discharged Ms. McAllister because it saw Ms. McAllister as part of the problem and not part of the solution to the agency's problems.

The weight of the evidence does not establish insubordination with regard to Ms. McAllister's handling of Mr. Seich's vacation request. The evidence indicates that the Board changed its position on Mr. Seich's continued employment, but that Ms. McAllister took appropriate steps to move forward on the vacation request.

The weight of the evidence fails to establish any intentional misconduct, carelessness, or negligence with regard to the purchase of the defective merchandise. The weight of the evidence indicates that Mr. Roberts does not accurately recall the conditions of the sale, the steps leading to the purchase, or the steps leading to Board approval of the purchase.

The weight of the evidence fails to establish intentional misconduct, negligence and/or carelessness with regard to the CARF paperwork. The evidence indicates that Ms. McAllister acted responsibly in forwarding the paperwork to the acting Executive Director appointed by the Board.

The weight of the evidence indicates that neither the conduct leading to the April reprimand nor the conduct during the June 13 meeting involved conduct that would constitute a "current act." See 871 IAC 24.32(8). Because there was no misconduct established in connection with the final events that triggered the discharge, these more remote concerns cannot serve as the basis for disqualifying Ms. McAllister for unemployment insurance benefits.

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

DECISION:

The Agency representative's August 29, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw