

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KATHI J NEILL
Claimant

TAYLOR OIL CO INC
Employer

APPEAL NO. 19A-UI-06876-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/14/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Kathi Neill filed a timely appeal from the August 14, 2019, reference 01, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that Ms. Neill was discharged on May 30, 2019 for conduct not in the best interest of the employer. After due notice was issued, a hearing was held on September 16, 2019. Ms. Neill participated. Erik Taylor represented the employer. Exhibits 1 through 10 were received into evidence at the time of the hearing. The administrative law judge deferred ruling on the admissibility of Exhibit 11, a video, until entry of the present decision. The claimant's objection to receipt of Exhibit 11 into evidence is overruled and the exhibit is received into evidence as a relevant and material exhibit. The authorities cited by Ms. Neill as the basis for excluding the digital surveillance depicting Ms. Neill's *actions and appearance* on May 16, 2019 pertain instead to intercepted *communications* and do not provide a basis for excluding Exhibit 11 from the record.

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: Kathi Neill was employed by Taylor Oil Company, Inc. from 2017 until May 30, 2019, when the business owner, Brad Taylor, and General Manager Eric Taylor discharged her from the employment. Those two men and General Manager Brooke Taylor functioned as Ms. Neill's supervisors. Ms. Neill began the employment as a server in the Cornstalk Café. Effective January 1, 2019, Ms. Neill became the full-time manager of the Cornstalk Café. In that role, Ms. Neill's regular work hours were 6:00 a.m. to 2:00 p.m. Monday through Friday. Ms. Neill would stay up to a couple hours later or work on weekends as necessary.

On May 6, 2019, a restaurant cook, Chris Knudsen, located a very small plastic Ziploc bag in the restaurant's walk-in freezer. The bag was empty, but contained a white powder residue. Mr. Knudsen brought the bag to the attention of Anita Salter, who managed the convenience

store adjacent to the employer's restaurant and who had previously managed the restaurant. Ms. Salter brought the bag to the attention of Erik Taylor and Brooke Taylor. The employer also brought the discovery to the attention of Ms. Neill, who agreed to look into the matter. The size and appearance of the bag caused the employer to conclude the bag had once contained a controlled substance.

The employer subsequently received multiple customer complaints and online reviews about Ms. Neill, about purported poor customer service at the café, and about concern that Ms. Neill might be under the influence of a drug. The employer discerned that Ms. Neill on certain days appeared to behave in an uncharacteristically unfocused manner. The employer does not have a drug testing policy.

On May 16, 2019, Mr. Knudsen alerted Erik Taylor to concerns about Ms. Neill's behavior. Mr. Knudsen used his personal cell phone to record Ms. Neill's unfocused, fidgeting behavior behind the café counter. Mr. Knudsen recorded Ms. Neill as she placed her pack of cigarettes in a cabinet under the counter and while she appeared to struggle with that process. While Ms. Neill was in a different area of the business establishment, Erik Taylor accessed Ms. Neill's pack of cigarettes under the counter and found in her pack of cigarettes a very small plastic Ziploc bag similar to the one that had earlier been located in the walk-in freezer. The bag contained a crystalized, rock-like substance that a reasonable person would conclude to be methamphetamine or a similar controlled substance. Mr. Taylor took photos of the cigarette package and the plastic bag to record what he had discovered. Mr. Taylor elected not to confront Ms. Neill about the substance or her behavior. The employer elected not to contact law enforcement regarding the presence of a controlled substance on the employer's premises. Instead, the employer thereafter went about recruiting another person to assume the restaurant manager duties. Once the employer had someone ready to step into those duties, the employer notified Ms. Neill on May 30, 2019, that the employer had "decided to go a different way."

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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).

The weight of the evidence in the record establishes a discharge for misconduct in connection with the employment. The weight of the evidence in the record establishes that Ms. Neill possessed an illegal controlled substance, most likely methamphetamine, in the workplace on May 16, 2019 and that she was under the influence of a controlled substance on that day. Ms. Neill's act of possessing the substance in the workplace demonstrated a willful and wanton disregard for the employer's interests. Ms. Neill's act of being at work under the influence of a controlled substance on May 16, 2019 also indicated a willful and wanton disregard of the employer's interests. The employer made a serious error in judgment by not immediately contacting law enforcement for assistance in addressing the matter. The employer made another error in judgment by not telling Ms. Neill specifically why the employer was ending her employment. However, the employer did not unreasonably delay by bringing the employment to an end within 10 working days of discovering the substance in Ms. Neill's cigarette package. The discharge was based on a current act within the meaning of the law. Ms. Neill is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Neill must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The August 14, 2019, reference 01, decision is affirmed. The claimant was discharged on May 30, 2019 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs