IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JACINDA S BOHLEN
Claimant

FERGUSON ENTERPRISES INC
Employer

APPEAL NO: 06A-UI-08719-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/16/06 R: 03
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Ferguson Enterprises filed a timely appeal from the August 18, 2006, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on September 14, 2006. Claimant Jacinda Bohlen participated. Human Resources Administrator Debra Damge represented the employer and presented additional testimony through Operations Manager Ted Simons. Employer's Exhibits One through Seven were received into evidence.

ISSUES:

Whether the claimant was discharged for misconduct that disqualifies her for unemployment insurance benefits.

Whether the errors the claimant made in the performance of her duties demonstrated recurrent negligence and/or carelessness rising to the level of substantial misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jacinda Bohlen was employed by Ferguson Enterprises as a full-time receiving clerk from July 11, 2005 until July 20, 2006, when Receiving Manager Ted Simons discharged her. As a receiving clerk, Ms. Bohlen was responsible for identifying and labeling products as they were received at the employer's facility. This was a several step process. Most of the product had a bar code Ms. Bohlen could scan. Some products lacked a bar code and Ms. Bohlen would have to figure out what the product was. Some products were similar, which made correctly identifying them more difficult. The employer provided a product list, a barcode scanning device, a computer database and more senior personnel to assist with this process. The more senior personnel were not always available when Ms. Bohlen needed them. Once Ms. Bohlen correctly identified the product, she had to print and attach an inventory tag. Ms. Bohlen received, identified and labeled 20-25 items and/or boxes per hour. The employer expected 97 percent accuracy rate. Errors could pertain to identification of an item or to the quantity of an item. The employer is not able to provide an accuracy percentage for Ms. Bohlen.

The final two receiving errors that prompted the discharge occurred and came to the employer's attention on July 12. The employer conducted no further investigation of the July 12 errors after

July 12, but did review Ms. Bohlen's prior errors. The July 12 errors followed one receiving error on April 13, April 25, July 6 and July 7. On March 24, Mr. Simons had formally reprimanded Ms. Bohlen for committing nine receiving errors between January 3 and March 21. When the employer brought errors to Ms. Bohlen's attention, it did not always provide sufficient information to allow Ms. Bohlen to understand where, when and how she had made the error.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Bohlen was discharged for misconduct in connection with the employment. 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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). 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 evidence indicates that Ms. Bohlen made two receiving errors on July 12. The evidence also establishes that Ms. Bohlen probably received, identified and labeled 160-200 items that day. The evidence does not indicate any intentional misconduct in connection with the errors of July 12. The mere existence of the errors would not necessarily indicate carelessness or negligence on the part of Ms. Bohlen and the evidence does not indicate carelessness or negligence here. The evidence indicates that Ms. Bohlen had many days where she apparently committed no receiving errors whatsoever. While the decision to discharge Ms. Bohlen was within the discretion of the employer, the administrative law judge concludes Ms. Bohlen was not discharged for misconduct. See 871 IAC 24.32(1)(a). Accordingly, Ms. Bohlen is eligible for benefits, provided she is otherwise eligible, and the employer's account may be charged for benefits paid to Ms. Bohlen.

The administrative law judge notes that even if the July 12 errors had constituted misconduct, the employer's delay in taking further action concerning Ms. Bohlen's employment after the July 12 errors came to light caused the errors to become past acts, rather than current acts, and still would not have disqualified Ms. Bohlen for benefits. See 871 IAC 24.32(8).

DECISION:

The Agency representatives August 18, 2006, reference 02, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/cs