

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

TOMESHA T MAZZIE
Claimant

APPEAL NO. 18A-UI-00854-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

N & S HOSPITALITY INC
Employer

OC: 01/22/17
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 January 9, 2018, reference 03, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefit Bureau deputy's conclusion that the claimant was discharged on October 25, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on February 12, 2018. Claimant Tomesha Mazzie participated. Cory Curtis represented the employer and presented additional testimony through Jiger Banker and Anamika Banker. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant (DBRO).

ISSUES:

Whether Ms. Mazzie was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: N & S Hospitality, Inc. owns and operates the AmericInn Lodge & Suites in Grimes. Jiger Banker and Anamika Banker, husband and wife, are the owners of N & S Hospitality, Inc. The Bankers reside in California and employ a general manager to operate the motel in Grimes. Since June 2017, Cory Curtis has been General Manager at the Grimes location. The Bankers monitor the motel's operations from California via Internet-connected video surveillance and computer network software that tracks Internet usage.

Tomesha Mazzie was employed by N & S Hospitality as a full-time Front Desk Agent at the Grimes AmericInn from August 18, 2017 until October 25, 2017, when Jiger Banker discharged her from the employment. Mr. Banker traveled to the Grimes AmericInn on October 25 to meet with Mr. Curtis and to discharge Ms. Mazzie from the employment. At the time of discharge, the employer told Ms. Mazzie she was being discharged due to poor customer service.

At the time Ms. Mazzie applied for the Front Desk Agent position, she disclosed to Mr. Curtis and to Anamika Banker that she was a college student at Des Moines Area Community College

(DMACC). At the time of hire, the employer indicated support for Ms. Mazzie's academic studies. At the time of hire, Mr. Curtis gave Ms. Mazzie permission to work on her college coursework during slow periods at the motel. Mr. Curtis did not withdraw that permission. Ms. Mazzie would work on her college coursework at the motel during her shift when Mr. Curtis was present and aware that she was doing so.

Mr. Banker monitored Ms. Mazzie's use of the employer's computer network and Internet connection to engage in non-work related activity. Mr. Banker was displeased with the use of the employer's resources for non-work related activities. Mr. Banker noted that Ms. Mazzie had used the employer's computer system on more than 10 days during the brief employment to engage in non-work related activities. The final date of such activity was October 23, 2017. On that day, Ms. Mazzie used the employer's Internet connection for DMACC-related activities from 8:22 a.m. to 9:03 a.m. In connection with that use, Ms. Mazzie used the employer's printer to print materials for school. The discharge followed two days later. The employer had not previously reprimanded Ms. Mazzie in connection with the employment.

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). 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 in the record fails to establish misconduct in connection with the employment that would disqualify Ms. Mazzie for unemployment insurance benefits or relieve the employer’s account of liability for benefits. While Mr. Banker had legitimate concerns about Ms. Mazzie’s work-related productivity as a result of her non-work related equipment and Internet usage, the weight of the evidence establishes that Ms. Mazzie engaged in such activity with the knowledge and approval of the General Manager, Mr. Curtis. Accordingly, the evidence does not establish an intentional and substantial disregard of the employer’s interests. Ms. Mazzie is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged for benefits.

DECISION:

The January 9, 2018, reference 03, decision is affirmed. The claimant was discharged on October 25, 2017 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/rvs