

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CAMMIE E CALLEN
Claimant

APPEAL NO. 11A-UI-06778-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EDWARD D JONES & CO LP
EDWARD D JONES & CO
Employer

OC: 04/17/11
Claimant: Appellant (2)

Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

Cammie Callen filed a timely appeal from the May 11, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 17, 2011. Ms. Callen participated. Human Resources Specialist Nikki Courtney represented the employer and presented additional testimony through Jeanie Forbes, senior associate relations specialist. Exhibit One was receive into evidence.

ISSUES:

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

Whether the discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Cammie Callen was employed by Edward D. Jones & Company as a full-time branch office administrator from 2008 until April 21, 2011, when the employer discharged her in connection with conduct that had occurred and had come to the employer's attention on April 11, 2011. Ms. Callen worked at the employer's Windsor Heights office under the supervision of Financial Advisor Matt Kneifl. Mr. Kneifl required that employees leaving the workplace during the workday obtain his approval first.

On April 11, Mr. Kneifl encountered Ms. Callen at a store at lunch time. Mr. Kneifl had not approved Ms. Callen's departure from the workplace. Ms. Callen told Mr. Kneifl that she was getting lunch for herself and another employee. Ms. Callen added that she was getting lunch for the other employee at that other employee's request. The latter part of Ms. Callen's statement was untrue and was uttered to mitigate the severity of any reprimand that might result from her unauthorized departure from the workplace. Ms. Callen then sent a text message to the other employee to let that person know what Ms. Callen had just told Mr. Kneifl. While Ms. Callen did not explicitly request that other employee back her lie concerning that employee's alleged request that Ms. Callen go get lunch for the pair, it was the implicit message conveyed by Ms. Callen's text message. The other employee was uncomfortable with the suggestion that she lie to the employer and brought the matter to the

attention of Mr. Kneifl when he returned to the office that day. Mr. Kneifl spoke to Ms. Callen later that same day and Ms. Callen confessed to have made up part of her statement to the employer and to sending the text message.

Mr. Kneifl, Ms. Callen, Senior Associate Relations Specialist Jeanie Forbes and Associate Relations Specialist Barb Cloward had participated in a conference call on April 7, 2011. The purpose of the call was to discuss concerns the employer had about Ms. Callen's work performance. On April 12, Ms. Callen received the written warning that flowed from the April 7 conference call. Ms. Callen and Mr. Kneifl both signed the warning on April 19.

From Monday, April 11, until the discharge on Thursday, April 21, Ms. Callen continued to report for work on a daily basis and performed her regular duties. From April 11 to the discharge on April 21, the employer said nothing to Ms. Callen to indicate that the conduct from April 11 placed her at risk of being discharged from the employment. Mr. Kneifl did not mention the April 11 conduct to Ms. Forbes until Friday, April 15. There was no further investigation of the April 11 incident beyond Mr. Kneifl's conversation with the two affected employees on April 11. On April 21, Ms. Forbes, Mr. Kneifl, and Ms. Callen participated in a conference call during which the employer discharged Ms. Callen from the employment.

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 evidence in the record fails to establish a current act. The evidence establishes that the conduct that triggered the discharge occurred on Monday, April 11, and came to the employer's attention that same day, and that the employer had all necessary information regarding the matter that same day. The employer then unreasonably delayed almost two whole work weeks, to Thursday, April 21, 2011, to notify Ms. Callen that the conduct could or would subject her to discharge from the employment.

Because the discharge was not based on a current act, the administrative law judge concludes that Ms. Callen was discharged for no disqualifying reason. Because the discharge was not based on a current act, the administrative law judge need not consider whether the conduct that triggered the discharge, or the prior conduct, constituted misconduct in connection with the employment. Ms. Callen is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Callen.

DECISION:

The Agency representative's May 11, 2011, reference 01, decision is reversed. The discharge was not based on a current act. 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