

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**WAYT, MELINDA, K**  
Claimant

**APPEAL NO. 12A-UI-10337-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY**  
Employer

**OC: 07/29/12  
Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the August 20, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 20, 2012. Claimant participated. The employer had named a representative and provided a telephone number which the representative could be reached for the hearing: Deb Behrens at 563-285-7915. However, Ms. Behrens was not available at the designated number at the time set for the hearing. The administrative law judge attempted to contact Ms. Behrens at the scheduled start of the hearing and made contact with the clerk on duty, who advised that Ms. Behrens had just left the store. The administrative law judge left an appropriate message with the clerk. Ms. Behrens contacted the administrative law judge after the hearing record had closed and after the claimant had been excused. Ms. Behrens failed to provide good cause to reopen 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: Melinda Wayt was employed by Casey's in Davenport as a part-time cook/cashier from October 2011 until July 14, 2012, when Deb Behrens, a manager from another store who was covering the store where Ms. Wayt worked, discharged Ms. Wayt from the employment for alleged insubordination. On July 12, 2012, Ms. Wayt arrived at work to find a Post-it note on the cash register computer screen. The Post-it note said that every employee needed to do a cigarette count at the beginning and at the end of the employee's shift. The cigarette count had previously been a manager responsibility. Ms. Wayt had done a partial cigarette count on one prior occasion, but did not believe she had been shown everything she needed to know in order to do a complete and appropriate cigarette count. Ms. Wayt spoke to an assistant manager, who confirmed that the cigarette count was a manager responsibility. Ms. Wayt then drafted a note to Ms. Behrens. In the note, Ms. Wayt said she did not know how to do the cigarette count and was not going to do it. Ms. Behrens subsequently summoned Ms. Wayt to a meeting to

discuss the note. Ms. Wayt said she did not know how to do the cigarette count and had never done it before. Ms. Wayt then left for a scheduled vacation.

On July 14, while Ms. Wayt was on her scheduled vacation, Ms. Behrens contacted her and notified her that she was discharged from the employment. At the time of the discharge, Ms. Behrens alleged that Ms. Wayt's cash drawer had at some point been \$11.00 short. Ms. Wayt asked why this had not been previously mentioned and Ms. Behrens said because it had not been short by a substantial amount.

## **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).

In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

The employer did not participate in the hearing and thereby failed to present any evidence to establish misconduct in connection with the employment. The evidence in the record indicates that the substituting manager attempted to delegate the cigarette count to the cashiers without ensuring the cashiers were adequately trained on the cigarette count. The evidence indicates that the cigarette count had previously been a manager responsibility. The evidence indicates that the claimant refused to perform the newly delegated duty through the note she left for the manager and during the meeting with the manager on that same day. Ms. Wayt refused to perform the duty because she did not believe she had been adequately trained to perform the duty. The employer has not presented evidence to establish that the directive was reasonable, that the refusal to follow the directive was unreasonable, or that Ms. Wayt had engaged in a pattern of unreasonably refusing to follow reasonable directives. The employer has presented no evidence to establish misconduct in connection with the alleged \$11.00 shortage.

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

**DECISION:**

The Agency representative's August 20, 2012, reference 01, decision is reversed. 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/css