

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LORI L ROSKE**

Claimant

**APPEAL NO. 13A-UI-04194-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY**

Employer

**OC: 02/24/13**

**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from a representative's decision dated March 27, 2013, reference 02, that allowed benefits. After due notice, a telephone hearing was held on May 13, 2013. The claimant participated. The employer participated by Ms. Darla Nelson, Store Manager.

**ISSUE:**

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered the evidence in the record, the administrative law judge finds: Lori Roske was employed by Casey's Marketing Company from April 30, 2011 until February 25, 2013 when she was discharged from employment. Ms. Roske was employed as a full-time cashier/cook and was paid by the hour. Her immediate supervisor was Darla Nelson.

Ms. Roske was discharged based upon the employer's belief that she had violated previous warnings by being rude and embarrassing another hourly employee on February 17, 2013. A third employee had told the store manager about the incident and Ms. Nelson had reviewed a security tape. Ms. Nelson believed that the security tape showed an adverse reaction on the part of the second employee and a customer who was present to Ms. Roske's statement. Ms. Nelson interviewed the second employee who had not complained about the incident but when asked the employee indicated that the statement was "embarrassing." Because Ms. Roske had previously been warned to be careful of her demeanor in dealing with other employees, a decision was made to terminate Ms. Roske from her employment.

During the February 17, 2013 incident, Ms. Roske had kiddingly stated to the second employee, "You are on my shit list." The second employee laughed at the claimant's conduct. It was Ms. Roske's position that it was not unusual for her and the employee to banter back and forth

and she did not believe her statement would cause her discharge or be interpreted as anything but made in a joking manner. Ms. Roske did not believe that her comment would violate any previous warnings that had been served upon her.

### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes intentional misconduct sufficient to warrant the denial of unemployment insurance benefits. 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.

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 insurance benefits. 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. of Appeals 1992).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based on a current act. See 871 IAC 24.32(8).

Allegations of misconduct 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 Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In this matter, the store manager was not present on February 17, 2013 during the incident that caused Ms. Roske's discharge. The matter was brought to the manager's attention by a third employee. Ms. Nelson reviewed the video portion of the security tape but seemed to confirm the third employee's version of what had transpired. The second employee who was involved with Ms. Roske during the incident had not complained about the incident prior to Ms. Nelson bringing the matter to his attention. Ms. Roske testified that she did not yell at the other employee or attempt to embarrass him but merely stated to the other employee, "You are on my shit list" in a kidding manner that had often been used before. Claimant further testified that the other employee was not upset. Ms. Roske testified that she was not aware that there were any customers nearby and that she did not believe the statement would violate the terms of any previous warnings that had been given to her.

While hearsay testimony is admissible in administrative proceedings, it cannot be accorded the same weight as sworn direct testimony providing that the direct testimony is credible and not inherently improbable. Administrative law judge finds Ms. Roske testimony to be credible, that the statement was made in jest and was not made in a loud or menacing manner.

While the decision to terminate Ms. Roske may have been a sound decision from a management view point, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing intentional disqualifying misconduct sufficient to warrant the denial of unemployment insurance benefits. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated March 27, 2013, reference 02, is affirmed. The claimant was discharged under nondisqualifying conditions. Unemployment insurance benefits are allowed, provided that the claimant meets all other eligibility requirements of Iowa law.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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