

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NIKKI M PALS
Claimant

APPEAL NO. 11A-UI-06317-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 04/03/11
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 5, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 9, 2011. Claimant participated. John Fiorelli of Corporate Cost Control represented the employer and presented testimony through Kitchen Manager Merlin Erickson.

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: Nikki Pals was employed by Hy-Vee as a part-time kitchen clerk in Spirit Lake from November 2010 until March 28, 2011, when Kitchen Manager Merlin Erickson discharged her. Mr. Erickson was Ms. Pals' immediate supervisor. The assistant kitchen managers also had supervisor authority over Ms. Pals' work. Ms. Pals holds teaching licenses and took the employment with Hy-Vee only as a stop-gap measure while she waited for a teaching opportunity. Ms. Pals was less than thrilled to be working as a kitchen clerk at Hy-Vee and readily conveyed this to staff and customers.

The final incident that triggered the discharge came to the employer's attention on March 27, 2011, when a customer contacted Assistant Manager Connie Wick with a complaint about Ms. Pals. Ms. Pals had recently waited on the customer. The customer reported that at the time Ms. Pals waited on him, she had said, "I will give you extra food if you promise that you will pray to God that He gives me a different job." In connection with the incident, Ms. Pals had indeed given the customer an extra portion of food that the customer had not requested. The customer complained to the employer because the situation had made him uncomfortable. Ms. Wick promptly notified Mr. Erickson of the complaint. The next day, Mr. Erickson confronted Ms. Pals about the customer complaint. Ms. Pals admitted to making the statement to the customer. Mr. Erickson deemed the incident tantamount to stealing from the employer to "bribe" a customer in violation of the employer's established food service and theft policies.

Ms. Pals was aware of the policy that required her to give the appropriate portion of food to a customer and to charge for all food served.

The final incident was not the only incident that factored into the discharge. On February 14, Ms. Pals had denied a customer's request for wheat bread on a hot turkey sandwich by saying that the kitchen did not have any wheat bread. Ms. Pals knew the statement was not true when she made it. Assistant Kitchen Manager Ben Meyer overheard the conversation and quickly corrected the statement and accommodated the customer's request. In the presence of the customer, Ms. Pals rolled her eyes, shook her head, and walked away, all as dismissive gestures directed at the customer. Ms. Pals' conduct upset the customer, who complained to Mr. Meyer. Mr. Meyer counseled Ms. Pals on the need to maintain appropriate facial expression and refrain from inappropriate gestures when interacting with customers.

On another occasion, Ms. Pals made an inappropriate comment to a cook. The cook was Latino. The cook's young daughter was at the store. Ms. Pals told the cook that the girl could not be his daughter because she was too white.

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 weight of the evidence does not support Ms. Pals’ version of events concerning her interaction with the customer. The weight of the evidence does indeed establish that the customer complained because Ms. Pals had conducted herself inappropriately, had involved the customer in the inappropriate conduct, and that the situation left the customer uncomfortable. The weight of the evidence establishes that Ms. Pals knew she was violating Hy-Vee policy at the time she interacted with the customer. The weight of the evidence establishes that Ms. Pals had a chip on her shoulder about having to lower herself to work at Hy-Vee while she waited for a teaching position and that Ms. Pals poisoned the Hy-Vee work environment as a result of her displeasure with her work situation. Had the final incident been the only incident, it might be dismissed as an error in judgment. But, the evidence indicates that final incident was part of a pattern of inappropriate conduct during a short period of employment. All of the conduct indicated a willful disregard of the employer’s interests. The pattern is sufficient to establish misconduct in connection with the employment that disqualifies Ms. Pals for benefits. Ms. Pals’ mildly insolent tone during the hearing was not a deciding factor in the case, but is noteworthy given the facts of the case.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Pals was discharged for misconduct. Accordingly, Ms. Pals is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer’s account shall not be charged for benefits paid to Ms. Pals.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant’s separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency’s initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If

Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's May 5, 2011, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account shall not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw