

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LANCE C HERINK
Claimant

APPEAL NO. 07A-UI-08306-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

O'REILLY AUTOMOTIVE INC
O'REILLY AUTO PARTS ATTN HR
Employer

OC: 02/11/07 R: 02
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

O'Reilly Auto Automotive, d/b/a O'Reilly Auto Parts, filed a timely appeal from the August 28, 2007, reference 06, decision that allowed benefits. After due notice was issued, a hearing was held on September 13, 2007. Claimant Lance Herink participated. Store Manager Mark Whipple represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which records indicate that no benefits have been disbursed since the August 2, 2007 separation. Exhibits One through Six, and A, were received into the record.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lance Herink was employed by O'Reilly Auto Parts as a full-time Parts Specialist from May 22 until August 2, 2007, when Store Manager Mark Whipple discharged him.

The final incident that prompted the discharge occurred on August 1, 2007. Mr. Herink was helping a regular customer who requested a discount. Mr. Herink had not previously met the customer. The employer's policy was to provide no customer discounts. Mr. Herink followed the employer's policy and advised that customer that he was not eligible for a discount. The customer paid for his purchase with a personal check. The employer's computer prompted Mr. Herink to request and review the customer's driver's license information. By this point in the transaction, the customer was using a raised voice. Mr. Herink has a voice that carries and may or may not have been speaking in a raised voice. Assistant Manager Dan Dennis was assisting another customer at a separate counter and did not take any steps to intervene in the matter beyond uttering, "hey, hey, hey." However, the transaction was complete and the customer was already out the door. The customer had not waited long enough to get his purchase receipt. On August 2, Mr. Dennis reported the incident to Store Manager Mark Whipple and Mr. Whipple

discharged Mr. Herink when he arrived for his shift. The customer did not make a complaint to the employer. The customer in question provided a written statement for the hearing, in which the customer indicates that he overreacted and that Mr. Herink had not done anything inappropriate. Assistant Manager Dan Dennis is still employed with the employer, but did not testify.

Mr. Whipple considered two other incidents when making the decision to discharge Mr. Herink. On or about July 16, 2007, Mr. Herink was present in the backroom when one or more other employees referred to a female customer as a bitch. The customer had just left the store. The customer was Mr. Herink's girlfriend's mother. Mr. Herink thought that such discussion regarding any customer was inappropriate and took offense to the epithet directed at his girlfriend's mother. Mr. Herink told the coworkers that they needed to shut up and that if they had a problem with the customer, they had a problem with him. Mr. Whipple told Mr. Herink to calm down or go home. Mr. Herink's demeanor calmed and he returned to work.

On or about July 27, 2007, Mr. Whipple intervened when Mr. Herink was interacting with a female customer. The customer needed help with selecting an inexpensive battery for her vehicle, but had advised Mr. Herink that she did not want the cheapest one. Mr. Herink appropriately used the employer's computer to ascertain the batteries that would work in the customer's car and then talked to the customer about three different batteries. The customer exhibited poor demeanor or attitude throughout the interaction. Mr. Whipple perceived that Mr. Herink's voice was getting louder during the interaction. Mr. Whipple did not think Mr. Herink was aware that his voice was getting louder. Mr. Whipple intervened and grabbed off the shelf the least expensive battery that would fit the customer's car. The customer later complained to the district manager about the service provided by Mr. Herink.

Mr. Herink was still within a 90-day probationary period of employment at the time Mr. Whipple discharged him.

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).

Regarding the final incident on August 1 that prompted the discharge, the weight of the evidence fails to establish that Mr. Herink engaged in intentional misconduct or that he was negligent or careless in dealing with the customer. Instead, the weight of the evidence indicates that the customer escalated the verbal exchange in response to information from Mr. Herink that the customer could not have a discount and in further response to the request for identification information after the customer wrote a personal check. The evidence indicates that Mr. Herink was simply complying with the employer's policies during the interaction. Mr. Herink may very well have lacked sufficient interpersonal skills to resolve the situation in the best manner possible. However, lack of skill is not misconduct. See 871 IAC 24.32(1)(a). The administrative law judge notes that the employer failed to present testimony from Assistant Manager Dan Dennis to support the allegation of misconduct in connection with this final incident. See 871 IAC 24.32(4).

Regarding the incident on July 27, the weight of the evidence fails to establish that Mr. Herink engaged in intentional misconduct or that he was negligent or careless in dealing with the customer. The weight of the evidence indicates that Mr. Herink followed the employer's policies and protocol in dealing with a female customer who was upset about having to purchase a new car battery. The evidence indicates that Mr. Whipple may not have heard the complete transaction. Mr. Whipple indicated through his testimony that Mr. Herink was following appropriate protocol in assisting the customer. Mr. Whipple indicated that he did not believe

Mr. Herink was aware that the volume of his voice was increasing. Again, Mr. Herink may very well have lacked sufficient interpersonal skills to resolve the situation in the best manner possible. However, lack of skill is not misconduct. See 871 IAC 24.32(1)(a).

Regarding the incident on July 16, the evidence fails to establish misconduct. Mr. Herink had just heard one or more coworkers refer to a customer, his girlfriend's mother, as a bitch. Mr. Herink reacted to the offensive remark in the manner many, if not most, people would have reacted under similar circumstances.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the evidence fails to establish misconduct, and that Mr. Herink was discharged for no disqualifying reason. Accordingly, Mr. Herink is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Herink.

DECISION:

The Agency representative's August 28, 2007, reference 06, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw