

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AUBREY A JOHNSON
Claimant

APPEAL NO. 12A-UI-04749-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KWIK SHOP INC
Employer

OC: 03/25/12
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 18, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 16, 2012. Claimant Aubrey Johnson did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Jeremy Glass, District Advisor, represented the employer. Exhibits One through Five and Seven through 11 were received into evidence.

The administrative law judge notes that in addition to the hearing notice mailed to the claimant on May 2, 2012, the claimant would also have received two more forms of notice alerting her of the May 16, 2012 hearing. The Appeals Section has mailed the claimant a copy of the employer's exhibits on May 3, 2012, with a cover sheet indicating the date and time of the hearing. Talx later mailed the claimant a second copy of the exhibits with the date and time of the hearing set forth in a cover letter.

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: Aubrey Johnson was employed by Kwik Shop, Inc. as a part-time clerk from November 2011 until March 23, 2012, when Dawn King, Store Manager, and Jeremy Glass, District Advisor, discharged her from the employment for theft and other policy violations. Ms. King was Ms. Johnson's immediate supervisor.

On March 23, 2012, Mr. Glass was at the Kwik Shop where Ms. Johnson worked for the purpose of reviewing video surveillance records as part of his investigation into inventory shrinkage. On March 23, Mr. Glass and Ms. King reviewed surveillance from February 26, 2012 that revealed Ms. Johnson engaged in multiple policy violations including theft. During the shift Ms. Johnson removed a lighter from a display, converted it to her personal use, and did not return it to the shelf. During the shift, overrode the cash register prompt and failed to enter birth

date information for customers purchasing cigarettes and beer. Ms. Johnson took multiple cigarette breaks, rather than performing assigned shift duties. On two instances Ms. Johnson was outside on a smoke break, doing nothing productive, while there were unsupervised and unserved customers inside the store. Ms. Johnson had received appropriate training with regard to all of the applicable policies and had signed her acknowledgment of the policies.

In making the decision to discharge Ms. Johnson from the employment, the employer also considered an earlier incident wherein Ms. Johnson allowed a friend to loiter inside the store throughout her shift in and then loitered outside the store entrance with her friends at the end of her shift.

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).

The evidence in the record establishes misconduct in connection with the employment. The final conduct that triggered the discharge occurred on February 26, 2012, but only came to the employer’s attention on March 23, 2012, when the employer reviewed surveillance video. The conduct in question constituted “current acts” for unemployment insurance purposes. The weight of the evidence indicates that on February 26, Ms. Johnson misappropriated merchandise, the lighter, and converted it to her own use. The evidence indicates that Ms. Johnson knowingly and intentionally violated multiple additional policies. These included the policy regarding smoke breaks, the policy regarding not leaving customers in the store unsupervised, and the policy regarding documentation of customer birth dates when the customer was purchasing restricted merchandise. Ms. Johnson’s conduct indicated a willful and wanton disregard of the employer’s interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Johnson was discharged for misconduct. Accordingly, Ms. Johnson 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. Johnson.

Because Ms. Johnson has not received any benefits in connection with the claim, there is no overpayment of benefits to address.

DECISION:

The Agency representative’s April 18, 2012, 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 will not be charged. No benefits have been disbursed. Accordingly, there is no overpayment of benefits to address.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs