

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTINA M DESMET
Claimant

APPEAL NO. 11A-UI-10657-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 07/10/11
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 2, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 6, 2011. Claimant Christina Desmet did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Alice Rose Thatch of Corporate Cost Control represented the employer and presented testimony through Jason Carver and Danielle Klein. Exhibits One through Five were received into evidence.

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: Christina Desmet was employed by Hy-Vee as a part-time kitchen clerk from March 2010 until June 21, 2011, when Kitchen Manager Jason Carver presented her with the option of quitting or being immediately discharged from the employment. Mr. Carver was Ms. Desmet's immediate supervisor. On Monday, June 20, 2011, Ms. Desmet asked for Saturday evening, June 25 off. The schedule was already posted. Mr. Carver denied Ms. Desmet's request. When Mr. Carver denied the request, Ms. Desmet indicated that she already had another job lined up. The next morning, another kitchen employee, Tony, alleged to Mr. Carver that Ms. Desmet had failed to complete a number of tasks in connection with her June 20 shift. Mr. Carver did not witness these issues himself, but decided, based on this report and based on the poor attitude Ms. Desmet had displayed in connection with his denial of her time off request, to force Ms. Desmet to resign or be discharged from the employment. Ms. Desmet had previously displayed poor attitude and referenced having another job lined up. Ms. Desmet was unhappy that the employer would not provide her with full-time work. Ms. Desmet was generally a reliable worker.

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 evidence in the record fails to establish misconduct in connection with the employment that would disqualify her for unemployment insurance benefits. The employer failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish that Ms. Desmet was careless and/or negligent in performing her duties on June 20. The employer had the ability to present testimony from the employee who allegedly witnessed these things, but the employer elected not to present such evidence. In any event, this isolated incident of negligence, if so established, would not have amounted to misconduct in connection with the employment. The evidence regarding Ms. Desmet's response to the denial of her time off request is also insufficient to establish misconduct. Had Ms. Desmet yelled or uttered profanity directed at Mr. Carver, then the conduct might rise to the level of misconduct. Displaying dissatisfaction in connection with a denied time off request, and including a statement that one has other employment options, might be sufficient basis for the employer to decide to end the employment, but it would not rise to the level of disqualifying misconduct. This instance of poor attitude, along with the prior similar instances alleged by the employer, is insufficient to establish misconduct that would disqualify Ms. Desmet for unemployment insurance benefits.

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

DECISION:

The Agency representative's August 2, 2011, reference 01, decision is affirmed. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css