

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CARMEN S JANSSEN
Claimant

APPEAL NO. 17A-UI-06639-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MENARD INC
Employer

OC: 05/28/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Carmen Janssen filed an appeal from the June 23, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the claims deputy's conclusion that Ms. Janssen was discharged on May 23, 2017 for insubordination in connection with the employment. After due notice was issued, a hearing was held on July 18, 2017. Ms. Janssen participated. Attorney Paul Hammell represented the employer and presented testimony through Bill Bankson and Robert McAvoy. Exhibits 1 through 4 were received into evidence.

ISSUE:

Whether Ms. Janssen separated from the employment for a reason that disqualifies her for benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Carmen Janssen was employed by Menard, Inc. as a part-time cashier at the Menard's store in Sioux City from 2015 until May 23, 2017, when Bill Bankson, First Assistant Store Manager, discharged her from the employment. Robert McAvoy, Front End Manager, was Ms. Janssen's immediate supervisor.

The employer has a somewhat unique set-up to its cash register lanes that is based on the nature of the products sold by the employer. As the customer enters the cash register lane, the customer encounters a cash register conveyor belt upon which the customer is expected to place those items for purchase that are not too heavy to lift from the shopping cart. The employer posts a sign at the register that reminds customers they may move their items from the cart to the conveyor belt. Most customers do indeed move such items from the cart to the conveyor. The employer positions the cash register and the cashier at the end of that first conveyor and before a second conveyor that carries scanned items to the end of the check-out lane. The employer places a small podium between the two conveyor belts to protect the cashier from being hit by larger items and for the cashier to use as needed. The cashier stands next to the cash register in aisle through which the customer wheels his or her cart. The

employer positions a credit card scanning device and a bagging area at the end of the cash register lane that is closest to the exit. The customer is expected to use that space to pay for and to bag the customer's purchase.

On May 23, 2017, a customer spoke to Mr. Bankson at the front of the Menard's store to complain about the customer's interaction with Ms. Janssen. The complaint immediately followed the customer's purchase of items at Ms. Janssen's check-out lane. The customer told Mr. Bankson that he had gone through Ms. Janssen's register lane. The customer told Mr. Bankson that Ms. Janssen had told the customer that she did not have to pick up anything out of his cart and had further told the customer that he had to pick up the items in his cart and place them on the register belt. The customer told Mr. Bankson that after Ms. Janssen scanned each of his items, she had then tossed the item onto the second conveyor belt at the end of the lane. Ms. Janssen became aware that the customer was complaining to Mr. Bankson at the front of the store, when another cashier observed the two men speaking and brought it to Ms. Janssen's attention.

After listening to the customer's complaint, Mr. Bankson reviewed surveillance video of Ms. Janssen's interaction with the customer. Mr. Bankson observed that after the customer brought his cart to the appropriate spot in Ms. Janssen's lane, the customer then moved to the end of the lane near the credit card scanner, where the customer would to be positioned to pay for the items. Mr. Bankson observed that after Ms. Janssen picked up smaller, miscellaneous items from the customer's cart and scanned the item, she then turned and tossed the item 1.5 to three feet onto the second conveyor that took the items to the end of the lane. Ms. Janssen was positioned so that she could have easily turned and placed the items on the conveyor without tossing them.

Based on the customer's complaint and his observation of the surveillance video, Mr. Bankson decided to issue a written reprimand to Ms. Janssen before she left at the end of her shift. The employer's reprimand form contained the following heading: "ADDITIONAL TRAINING & COMMUNICATION NEEDED." The written reprimand indicated the form of disciplinary action to be taken as "Written Warning." The written reprimand Mr. Bankson prepared included the following statements regarding the incident:

Nature of Discussion:

Carmen told guest he had to put items on register to be checked out. Then she checked out items first by only checking items in the cart, then by scanning items left and throwing them onto the back half of register.

What Team Member and/or Management will do to solve the problem:

Carmen will not treat guests with this type of attitude, nor will she throw items onto the register. If Carmen continues these actions she may be suspended or terminated at unit manager discretion.

Between the two above paragraphs was a space for "Team Member Comments." The written reprimand contained a place for Ms. Janssen to sign and date the reprimand as the affected Team Member. Immediately above that signature blank appeared the following: "I understand the above." Below the Team Member Signature line, there was a place for Supervisor Signature and date. Immediately above that blank appeared the following: "I have discussed the above with the named Team Member. Mr. Bankson signed the document. Two other management staff subsequently signed below Mr. Bankson.

When Ms. Janssen reached the end of her shift, a head cashier told Ms. Jansen that she needed to report to the office before she clocked out. Mr. Bankson met with Ms. Janssen at that time to discuss the customer's complaint and to issue the written reprimand. Mr. Bankson had a human resources representative and another member of the management staff sit in on the meeting. These two later added their signatures to the reprimand. At the start of the meeting, Ms. Janssen asked why the meeting was being held. Mr. Bankson told Ms. Janssen the meeting pertained to her actions with the guest and the transaction in question. Mr. Bankson showed Ms. Janssen the video surveillance record of her interaction with the customer. Mr. Bankson told Ms. Janssen, "This is not how we treat guests." Ms. Janssen referenced a sign posted at her check-out lane. Ms. Janssen asserted that the sign stated the customer had to put his items on the conveyor belt and that she had not wanted to remove the items from the cart. Mr. Bankson told Ms. Janssen that the sign does not require the guest to place the items on the conveyor belt and that Ms. Janssen was required to scan the items for purchase regardless. During the meeting, Mr. Bankson presented the written reprimand to Ms. Janssen for her signature. Ms. Janssen told Mr. Bankson that she did not agree with the reprimand and would not sign it. Ms. Janssen believed that her signature on the reprimand would indicate agreement with the employer's statement of the underlying incident. Despite Ms. Janssen's statement that she would not sign the document because she did not agree with it, Mr. Bankson did not say anything to clarify that Ms. Janssen's signature would merely acknowledge the discussion, rather than indicate agreement. Ms. Janssen told Mr. Bankson that the employer "legally" could not make her sign the form. Mr. Bankson told Ms. Janssen that he could not force her to sign the reprimand, but he could ask for her badge. By this, Mr. Bankson meant that he could discharge her from the employment. Ms. Janssen would need the badge to access the store electronic time clock. Though Mr. Bankson did not actually ask for Ms. Janssen's badge, but Ms. Janssen misinterpreted his utterance as asking for her badge. Ms. Janssen removed her badge from her person and handed the badge to Mr. Bankson. Shortly thereafter, Mr. Bankson ended the meeting. As he, Ms. Janssen, and others left the meeting room, Ms. Janssen asked if she could have her badge back and offered to sign the reprimand. Mr. Bankson told Ms. Janssen, "The discussion is over." By this, Mr. Bankson meant that Ms. Janssen's employment was done. Ms. Janssen was then escorted from the workplace. At no point did Ms. Janssen state that she was quitting the employment. Mr. Bankson noted on the written reprimand that Ms. Janssen had "Refused to Sign." At no time did Ms. Janssen add comments in the Team Member Comments section.

After Ms. Janssen had left the workplace, Mr. Bankson prepared a second written reprimand pertaining to Ms. Janssen in which he stated as follows:

Nature of Discussion

During additional training and communication with Carmen she got argumentative about the written warning. Carmen said legally we cannot make her sign the communication form.

What Team Member and/or Management will do to solve the problem:

Carmen was argumentative and I (Bill) told her I can ask for her badge, she took her badge off and gave it to me. She then left the room and the building.

Mr. Bankson and the other two management staff who had participated in the meeting signed the written reprimand. While there was a space for Ms. Janssen's signature, the document was not presented to Ms. Janssen for her signature.

The only prior reprimand the employer had issued to Ms. Janssen concerning her interaction with a customer had been issued to Ms. Janssen on June 21, 2015. The reprimand was in the

same format as the May 23, 2017 reprimand. The reprimand set forth the basis of the reprimand as follows:

Nature of Discussion

Bad guest service-on the above date we had a guest voice her concern about bad services carmen gave. The guest had a product waiting for them on another register and asked carmen to get it for them, carmen said no I can't, did not offer any other help and laughed at the guest. When the guest mentioned she was rude and asked the nxt [sic] cashier over to get items for her carmen then refused to ring up the guest. This is unacceptable, we will doe [sic] our best every day to help the guests in our store, use manners and make them leave happy.

The reprimand further stated:

What Team Member and/or Management will do to solve the problem:

This type of behavior is not allowed, any other bad guest complaints will result in a suspension.

During the disciplinary meeting on June 21, 2015, Ms. Janssen refused to sign the written reprimand. The issuing supervisor noted this as follows: "Refused to sign write up at first Threatened termination before signing." After Ms. Janssen's refusal to sign the reprimand, and after the issuing manager threatened her with discharge from the employment, Ms. Janssen wrote comments in the Team Member Comments space and initialed the reprimand. Ms. Janssen's wrote as follows:

Told by head cashier to not leave my register 2 hrs prior to incident, so told her I could not leave my register, but yet cashier next to me left his register to get her product instead of ringing bell for assistance.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.*, 494 N.W.2d 660 (1993).

The weight of the evidence establishes that Ms. Janssen was discharged from the employment and fails to support the employer's assertion that Ms. Janssen voluntarily quit. The employer points to Ms. Janssen handing Mr. Bankson her badge during the office meeting as indication of a voluntary quit. The weight of the evidence establishes that Ms. Janssen provided the badge in response to Mr. Bankson's statement that he could request the badge. Ms. Janssen misunderstood the statement and understood Mr. Bankson to be asking for her badge. Ms. Janssen complied with that request. Ms. Janssen made no statement indicating an intention to quit the employment. Ms. Janssen stayed in the meeting until it was done. At the end of the meeting, Ms. Janssen asked for her badge back. Ms. Janssen's words and actions would not have led a reasonable person to conclude that she had quit the employment. The weight of the evidence indicates that Mr. Bankson did not understand Ms. Janssen's words or actions to communicate a quit. If there was any doubt on his part, Ms. Janssen clarified her intent by asking for return of her badge. At that point, Mr. Bankson communicated that the employment was done.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in a discharge 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 Iowa Supreme Court held that an employee's refusal to sign a written warning was misconduct as a matter of law, where that supervisor told the employee, and the employer knew, that by signing the reprimand she was only acknowledging she had received the notice and where the employer warned the employee that she would be discharged if she did not sign the reprimand. *Green v. IDJS*, 299 N.W.2d 651 (Iowa 1980).

The Iowa Court of Appeals held, in an unpublished, non-precedential decision entered in 2002, that the holding in *Green* did not apply, and misconduct was not established, where the supervisor did not make clear to the employee that by signing the reprimand he was merely acknowledging receipt of the notice, rather than agreeing with the reprimand, and where the employer did not notify the employee that he would lose his job if he did not sign the warning. *Etcher Farms, Inc. v. Employment Appeal Board*, 2002 WL 31018409, No. 02-1364 (Iowa Ct. App. 2002).

The weight of the evidence fails to establish misconduct in connection with the employment that would disqualify Ms. Janssen from unemployment insurance benefits. The weight of the evidence does support the conclusion that Ms. Janssen was less than courteous with the customer on May 23, 2017. Ms. Janssen's version of that incident does not make sense. The weight of the evidence establishes that Ms. Janssen did indeed tell the customer that he needed to move his items from his cart to the conveyor. The weight of the evidence also establishes that when the customer did not comply with the directive, Ms. Janssen demonstrated her displeasure by needlessly tossing the customer's items on the second conveyor, rather than placing the items on the conveyor in a courteous manner. The customer's version of the incident was born out by Mr. Bankson's review of the surveillance record. This incident of discourteous behavior demonstrated a degree of disregard for the customer's shopping experience, and in the employer's interest in maintaining good customer relationships, but did

not rise to the level of substantial disregard. Addition of the incident from almost two years earlier does not establish a pattern of discourteous behavior on the part of Ms. Janssen.

Ms. Janssen's initial refusal to sign the reprimand on May 23, 2017 also did not rise to the level of substantial disregard of the employer's interests. The employee signature area of the employer's written reprimand form is poorly worded if the intent of the form is to have employees acknowledge the reprimand, rather than indicate agreement with the reprimand, through their signature. Ms. Janssen told the employer her basis for refusing to sign the form was that she did not agree with the content of the reprimand. That moment presented a reasonable opportunity for Mr. Bankson to clarify that Ms. Janssen's signature would indicate acknowledgement of the reprimand, rather than agreement with the reprimand. The weight of the evidence establishes that Mr. Bankson did indeed warn Ms. Janssen that she could be discharged from the employment if she did not sign the reprimand, but not that she would in fact be discharged for refusing to sign. As the meeting was adjourning, Ms. Janssen asked for her badge back and agreed to sign the reprimand. Mr. Bankson had not yet communicated a discharge and Ms. Janssen had not communicated a voluntary quit. Rather than acknowledge and facilitate Ms. Janssen's belated compliance with the disciplinary process, Mr. Bankson elected to discharge her from the employment.

Factoring in the disciplinary incident from almost two years earlier does not cause the final refusal incident to rise to the level of substantial disregard of the employer's interests. First, the prior incident was so remote in time that it does not establish a pattern of refusal. In the prior instance, Ms. Janssen eventually initialed the reprimand under threat of being discharged from the employment.

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

DECISION:

The June 23, 2017, reference 01, decision is reversed. The claimant was discharged on May 23, 2017 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

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