

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LAURA C WELCH
Claimant

APPEAL NO. 08A-UI-04250-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 10/07/07 R: 04
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Laura Welch filed a timely appeal from the April 30, 2008, reference 05, decision that denied benefits. After due notice was issued, a hearing was held on May 14, 2008. Ms. Welch participated. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. The employer received the hearing notice that was mailed on May 5, 2008, as indicated by the employer's May 7, 2008 request for the documents submitted and/or generated in connection with the fact-finding interview.

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: Laura Welch was employed by Hy-Vee as a part-time fuel station clerk from December 2007 until April 1, 2008, when the store manager and Tammy Shepard, Fuel Store Manager, discharged her. Ms. Shepard was Ms. Welch's immediate supervisor.

The final incident that prompted the discharge concerned a customer complaint. At the time of the discharge, the store manager told Ms. Welch that there had been an incident where Ms. Welch was not polite to a customer and had not taken care of the customer. Ms. Welch was not aware of the incident to which the store manager was referring. The store manager told Ms. Welch that he was discharging her because she was not a person who should be in a customer service position.

On March 3, Ms. Shepard issued a written reprimand to Ms. Welch based on two customers' complaints. One customer complained that Ms. Welch had told the customer that the store was closing. The second customer complained that Ms. Welch had been rude and unhelpful. On March 17, Ms. Shepard issued a warning to Ms. Welch after a customer drove off without paying for gasoline. The customer came back the next day and Ms. Welch attempted to resolve the matter on her own.

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 employer failed to appear for the hearing and, thereby, failed to present any evidence to support the allegations of misconduct. Misconduct cannot be established. See 871 IAC 24.32(4).

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

DECISION:

The Agency representative's April 30, 2008, reference 05, decision is reversed. 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/kjw