

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DWIGHT D DAVIS

Claimant

APPEAL NO. 11A-UI-07182-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 04/17/11

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated May 23, 2011, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was held on June 23, 2011. The claimant participated personally. The employer participated by Ms. Sonia Carlson, store manager.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Dwight Davis was employed by Casey's General Stores from May 5, 2008, until April 17, 2011, when he was discharged from employment. Mr. Davis worked as a part-time pizza maker and was paid by the hour. His immediate supervisor was the store manager, Sonia Carlson.

Mr. Davis was discharged based upon the allegation of a customer that he had overheard Mr. Davis threatening to "spit into another customer's pizza if the customer did not provide Mr. Davis a tip." Because the claimant had been previously warned about his work demeanor, the store manager believed that the allegation was true and discharged the claimant. The employer believed that the claimant's conduct in threatening to contaminate food required his discharge from employment.

When the allegation was brought to Mr. Davis's attention by the store manager, Mr. Davis denied it. The claimant denies making any request for tips or making any threats to contaminate food. The claimant agrees that he had been warned in the past but maintains that, since being warned, he had made efforts to improve his work demeanor.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment benefits. It is not.

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. 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 App. 1992).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. If the employer is unable to furnish evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

In this case, a decision was made to terminate Mr. Davis based upon the allegation by another individual that Mr. Davis had made a threat to contaminate food during a conversation with

another customer. When this allegation was brought to Mr. Davis's attention, the claimant denied it, and the claimant has maintained that the incident did not occur.

In this case, the claimant participated personally and provided firsthand, sworn testimony. In contrast, the evidence supplied by the employer is hearsay in nature. Although hearsay is admissible in administrative proceedings, it cannot be accorded the same weight as sworn, direct testimony. The administrative law judge finds the claimant's testimony to not be inherently improbable.

While the decision to terminate Mr. Davis may have been a sound decision from a management viewpoint, the evidence in the record is not sufficient to warrant the denial of unemployment insurance benefits. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's decision dated May 23, 2011, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw