

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CINDY L TOMETICH
Claimant

APPEAL NO. 16A-UI-04840-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 04/03/16
Claimant: Respondent (1)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
I871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 18, 2016, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on March 21, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on May 10, 2016. Claimant Cindy Tometich participated. Francis Landolphi represented the employer and presented testimony through Jamie Aulwes and Kim Lundeen. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 13 and 15 through 19 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the discharge was based on a current act.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Cindy Tometich was employed by Hy-Vee from 2010 until March 21, 2016, when Jamie Aulwes and Jeff Kent discharged her from the employment. Mr. Kent is the Facility Manager for the employer's grocery distribution warehouse. Mr. Aulwes is currently Director of Grocery and Health and Beauty Care, but was Director of Human Resources during Ms. Tometich's employment. From December 2013 until the discharge, Ms. Tometich worked as a full-time inventory coordinator. Her work hours were 3:00 p.m. to 11:00 p.m. Kim Lundeen was also an

inventory coordinator. Ms. Lundeen's work hours were 8:00 p.m. to 4:00 a.m. Dave Bellon, Inventory Manager, supervised Ms. Tometich and Ms. Lundeen. During the employment, Ms. Tometich had earned a reputation for being short, abrupt, rude and sometimes mean when interacting with others in the workplace. Such conduct ran counter to Hy-Vee's Code of Conduct, which promoted values that include friendliness, caring, sharing, fairness and manners. Ms. Lundeen ended up on the receiving end of Ms. Tometich's disagreeable demeanor and conduct more than others.

The final incident that triggered the discharge occurred on February 24, 2016. On that day, Randy Regennitter, Grocery Department Manager, asked Ms. Lundeen to come in early to work on inventory. When Ms. Lundeen arrived, she asked Ms. Tometich how inventory was going. Ms. Tometich said she did not know, that Ms. Lundeen was taking over, and that Ms. Tometich had to perform scanning. Ms. Tometich had a scanning project that she needed to complete immediately. Ms. Lundeen asked Ms. Tometich whether there was any scanning that she could assist her with and Ms. Tometich indicated she did not need any help. Ms. Tometich then walked off. Ms. Lundeen thought Ms. Tometich had been "snippy." Another employee, Callie Clow, had been present and shared that opinion of Ms. Tometich's response to Ms. Lundeen's greeting. Ms. Lundeen promptly reported the incident to Mr. Regennitter. Mr. Regennitter promptly reported the matter to other members of management, including Mr. Kent. On February 25, a couple of managers spoke with Ms. Tometich about the incident. No one said anything to Ms. Tometich at the time of that meeting to suggest that the incident could or would trigger her discharge from the employment.

Nothing more happened concerning the February 24 incident until March 16, 2016, when Mr. Aulwes learned of the incident. On March 16, Mr. Aulwes notified Ms. Tometich that would be suspended while he investigated the matter and that the result of the investigation could lead to Ms. Tometich being disciplined or discharged from the employment. Mr. Aulwes then set about interviewing Ms. Tometich's coworkers and collecting written statements. Assistant Manager Joel Chandler referenced an incident on March 9, 2016 wherein Ms. Tometich had insisted in responding to a radioed request for assistance after Ms. Lundeen had already radioed that she would respond to the request. While one coworker provided a statement attesting to Ms. Tometich's intelligence and dedication, most who provided statements had at least one story about Ms. Tometich's abrasive demeanor. On March 21, 2016, Mr. Aulwes met with Ms. Tometich to review the statements to and provide her an opportunity to respond. Ms. Tometich did not have much to say in response. Mr. Aulwes notified Ms. Tometich that the employer was discharging her from the employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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 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 a current act of misconduct. The final incident that triggered the discharge, and that had triggered the investigation that led to the discharge, occurred on February 24, 2016 and was address with Ms. Tometich on February 25, 2016. Nothing was said at that time to indicate that the incident could or would result in Ms. Tometich being discharged from the employment. The matter went dormant for 20 days, at which time Mr. Aulwes decided to take further action on the matter. At that point, the conduct on February 24 no longer constituted a current act. Neither the March 16 suspension nor the

March 21 discharge was based on a current act. The administrative law judge notes that Ms. Lundeen did not mention the March 9 radio message as a concern and the employer did not reference that matter as the triggering incident. Because the discharge was not based on a current act, the discharge cannot serve as a basis for disqualifying Ms. Tometich for unemployment insurance benefits. Because Ms. Tometich was discharged for no disqualifying reason, she is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

Even if the evidence had established a current act of some kind, the evidence does not establish a current act of misconduct. Many people in the workplace have disagreeable personalities and dyspeptic demeanors to one extent or another. As uncomfortable as it may at times be to be around such types, such character or personality issues do not necessarily rise to the level of misconduct. While there had been more serious conduct issues much earlier in Ms. Tometich's employment, the February 24 communication involved nothing more than a mild expression of frustration by a stressed employee. While the employer may have tired of the interpersonal concerns involving Ms. Tometich, and while it was within the employer's discretion to end the at-will employment, the discharge was not based on misconduct within the definition provided in the unemployment insurance law.

DECISION:

The April 18, 2016, 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