

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARISSA C NICHOLS
Claimant

APPEAL NO. 10A-UI-14751-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

K MART CORP
Employer

OC: 09/19/10
Claimant: Respondent (1)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

K Mart Corporation filed an appeal from a representative's decision dated October 18, 2010, reference 01, which held that no disqualification would be imposed regarding Marissa Nichols' separation from employment. After due notice was issued, a hearing was held by telephone on December 16, 2010. Ms. Nichols participated personally. The employer participated by Joe Connelly, Store Manager.

ISSUE:

At issue in this matter is whether Ms. Nichols was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Nichols began working for K Mart Corporation on December 15, 2007. She worked from 15 to 20 hours each week as a sales associate. She was discharged for violating the employer's zero-tolerance policy regarding violence.

On or about July 24, 2010, an associate reported that Ms. Nichols had threatened to punch another associate, Jennifer Roush, in the face. Ms. Nichols was frustrated with Ms. Roush's refusal to follow directives and told her coworker that she was so mad she would punch her, referring to Ms. Roush, in the face. There was no threat made directly to Ms. Roush. The employer was immediately made aware of the comment and sought assistance from its Chicago office on July 27. Statements were collected and sent to the Chicago office on July 30, August 16, August 27, and September 7. Ms. Nichols was notified of her discharge on September 21, 2010. The employer did not allege any acts of misconduct during the interim between July 24 and September 21, 2010.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had

the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer's burden included establishing that the discharge was predicated on a current act of misconduct. 871 IAC 24.32(8). In the case at hand, the final conduct that prompted the discharge occurred on July 24 and was immediately brought to the employer's attention but Ms. Nichols was not discharged until almost two months later. Even allowing time for an investigation, the final documentation was sent to Chicago on September 7. It was still not until two weeks later that Ms. Nichols was discharged. During the interim, she was not put on notice that she was being considered for discharge.

For the reasons cited above, the administrative law judge concludes that, due to the delay in discharging, the incident of July 24 was not a current act of misconduct in relation to the discharge date. Even if the administrative law judge were to conclude that the employer's delay was justified, the evidence still would not support a disqualification from benefits. Ms. Nichols acknowledged that she made the statement about wanting to punch Ms. Roush in the face. She was merely venting her frustration when she made the statement to her coworker. She did not make the threat directly to Ms. Roush and there was no evidence that she ever attempted to strike Ms. Roush. This single "hot-headed" incident is not sufficient to establish disqualifying misconduct.

It was well within the employer's prerogative to discharge Ms. Nichols. However, conduct that might warrant a discharge will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). The evidence in this matter does not establish an act of substantial misconduct as required for a disqualification. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). For the reasons stated herein, benefits are allowed.

DECISION:

The representative's decision dated October 18, 2010, reference 01, is hereby affirmed. Ms. Nichols was discharged but a current act of disqualifying misconduct has not been established. Benefits are allowed, provided she is otherwise eligible.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/css