

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TAMMY J JOHNSON
Claimant

APPEAL NO. 12A-UI-01063-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MURPHY OIL USA INC
Employer

OC: 12/04/11
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 19, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 20, 2012. Claimant Tammy Johnson participated. Annette Hatch, District Manager, represented the employer and presented additional testimony through Bruce Pederson, Store Manager. Exhibits One and Ten were received into evidence.

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: Tammy Johnson was employed by Murphy Oil USA, Inc., from 2001 until December 7, 2011, when Annette Hatch, District Manager, and Bruce Pederson, Store Manager, discharged for illegal sale of tobacco products to a minor. During the final four or five years of the employment, Ms. Johnson was the full-time assistant manager at the employer's Fort Dodge store.

On December 7, 2011, Ms. Johnson sold cigarettes to a minor and was caught in a police sting. Ms. Johnson requested the minor's customer's ID per policy and began to key in the customer's birth date per policy. Ms. Johnson noted that the customer's birth date was in 1994, meaning there was no way the customer could be 18 years old and old enough to legally purchase tobacco products. Ms. Johnson used a manual override key on the cash register to push the sale through the employer's computerized age verification system and went through with the sale. A police officer was standing by and cited Ms. Johnson for the illegal sale. Ms. Johnson notified her supervisor, Mr. Pederson. Mr. Pederson and District Manager Annette Hatch went to the store and reviewed surveillance video and audio. The surveillance video and computer record of the transactions documented that Ms. Johnson had used the override button to push through the sale and bypass the age verification system.

Under the employer's written work rules, sale of tobacco products to a minor was grounds for discharge from the employment. Ms. Johnson was aware of the work rule.

Ms. Johnson had been properly trained in how to properly ID a customer desiring to purchase alcohol products. Ms. Johnson had three ways by which she could verify the customer's age. The first was simply to read the birth date from the ID. Since the customer had to be at least 18 years old to purchase tobacco, the customer's birth date would have to be on or before December 7, 1993 in order to be old enough to legally purchase tobacco products on December 7, 2011. The employer provided a calendar near the cash register that indicated the day a customer would have to have been born to legally purchase tobacco products. The second way by which Ms. Johnson could verify a customer's age was to scan the back of the customer's ID with the scanning device. The scanning device was operating properly on December 7, 2011, despite Ms. Johnson's assertions to the contrary. Ms. Johnson had used the scanning device to ring up purchases that very day. The third way Ms. Johnson could verify the customer's age was to key the customer's birth date into the cash register. If the cash register detected that the customer was not old enough to purchase tobacco, the cash register would indicate as much. This is the process that Ms. Johnson started, but intentionally aborted to push the sale through.

Ms. Johnson ended being charged with illegal sale of tobacco products to a minor. The legal penalty for such conduct was a scheduled fine of \$100.00 plus court costs. Under Iowa Code section 805.8C(3)(b)(1), the penalty for the offense was the same regardless of whether Ms. Johnson plead guilty at the start or contested the charge and was subsequently found guilty. The employer was also assessed a civil penalty because the violation took place at their store.

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 weight of the evidence establishes that Ms. Johnson knowingly violated the employer policy regarding sale of tobacco products to a minor and also violated Iowa Code section 453A.2(1), which prohibits sale of tobacco products to a person under 18. Significant aspects of Ms. Johnson's testimony were simply not credible. Ms. Johnson initially asserted that she had no idea how to override the cash register, but later admitted she did. Ms. Johnson asserted the scanner did not work, but later admitted it did work for at least some things. Ms. Johnson asserted the register provided a readout that indicated the customer was old enough to purchase tobacco. The surveillance and cash register record clearly indicates otherwise. The weight of the evidence indicates that all three of Ms. Johnson's self-serving assertions were false. Ms. Johnson knowingly violated the employer's policy and the law. Ms. Johnson got caught and was discharged as a result. Ms. Johnson's conduct was in willful and wanton disregard of the employer's interest in continuing gainful operation of its store within the law so as to avoid financial loss and legal penalties.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Johnson was discharged for misconduct. Accordingly, Ms. Johnson is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Johnson.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated

in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's January 19, 2012, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account shall not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css