

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

PAMELA D JORDAN
Claimant

APPEAL NO. 19A-UI-00612-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 12/09/18
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 9, 2019, reference 01, decision that held the claimant was eligible for benefits provided she met all other eligibility requirements and the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on December 7, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on February 5, 2019. Claimant Pamela Jordan participated. Amber Caudle represented the employer and presented additional testimony through Marclene McKee. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 and 3 through 9 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 employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Pamela Jordan was employed by Casey's Marketing Company during two distinct periods. The most recent employment began in 2016 and ended on December 7, 2018, when Store Manager Amber Caudle discharged Ms. Jordan from the employment. Ms. Jordan worked as a full-time clerk at a Casey's store in Atlantic. Ms. Caudle became Ms. Jordan's supervisor in June 2018.

The final incident that triggered the discharge occurred on December 4, 2018. Ms. Caudle was present for and witnessed the incident in question. A customer requested that Ms. Jordan authorize a particular fuel pump and Ms. Jordan complied. The customer needed diesel fuel, but erroneously requested that Ms. Jordan authorize a pump number that did not dispense

diesel. Though the customer had made the error when requesting the pump, the customer chose to yell at Ms. Jordan and accuse Ms. Jordan of authorizing the wrong pump. In the heat of the moment, Ms. Jordan raised her voice while telling the customer that she had authorized the pump the customer requested and that the customer had initially requested a non-diesel pump. Ms. Jordan then authorized the diesel pump. Ms. Caudle had been about to leave the store at the end of her shift when she observed the interaction. Once the customer exited the store, Ms. Caudle told Ms. Jordan that she could not yell at customers. When Ms. Jordan reported for work on December 7, 2018, Ms. Caudle presented Ms. Jordan with a written reprimand and discharged her from the employment. The reprimand referenced the employer's written policy regarding employee conduct, which policy required that employees exhibit professionalism when interacting with coworkers and customers. The policy was included in the employee handbook the employer had Ms. Jordan acknowledge at the start of her employment. Ms. Jordan had access to the handbook throughout her employment.

In making the decision to discharge Ms. Jordan from the employment, Ms. Caudle also considered an earlier allegation that Ms. Jordan had yelled at a coworker on Saturday, October 6, 2018. Ms. Caudle had not been present for the incident. Megan Bahntge, Assistant Manager, had been the manager on duty at the time. Ms. Bahntge and store employees Amy Lett and Kathy Kercheff alleged that Ms. Jordan had gotten into an argument with and was rude to Ms. Lett. Ms. Lett had not been scheduled to work that day. However, because the store was busy, Ms. Caudle had called Ms. Lett in to work. When Ms. Jordan asked Ms. Lett to help serve customers at the check-out counter, Ms. Lett asserted that she had been called in only to make coffee and not to help at the register. Ms. Caudle does not know what words were then exchanged. Ms. Caudle reviewed video surveillance of the incident, but the surveillance lacked audio. Ms. Jordan denies that raised voices were used or that inappropriate words were exchanged. Ms. Caudle collected written statements from the employees, but did not have the statements at the time of the appeal hearing and does not recall what the statements said. On October 12, 2018, Ms. Caudle issued a written reprimand to Ms. Jordan in connection with the incident. Ms. Caudle referenced the employee conduct policy in the reprimand.

In making the decision to discharge Ms. Jordan from the employment, Ms. Caudle also considered Ms. Jordan's absence on October 10, 2018. However, on that day Ms. Jordan was absent due to illness and properly reported the absence to the employer.

In making the decision to discharge Ms. Jordan from the employment, Ms. Caudle also considered allegations that Ms. Jordan had told other staff and customers that she did not receive breaks at work and that Ms. Caudle lacked a backbone. Ms. Jordan denied having made such statements. On September 4, 2018, Ms. Caudle issued a written reprimand to Ms. Jordan in connection with the allegations.

In making the decision to discharge Ms. Jordan from the employment, Ms. Caudle considered reprimands that her predecessor, Tamara Weideman, had issued to Ms. Jordan. All of these reprimands and the associated alleged conduct predated Ms. Caudle's tenure at the Atlantic Casey's store. The reprimands concerned a cash register shortage in September 2016, alleged unprofessional behavior in communicating frustration to coworkers and managers in October 2016, a gas drive-off in December 2016, cashing in lottery tickets while on duty in January 2017, failing to verify the age of a customer purchasing cigarettes in February 2017, and a cash register shortage in July 2017.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The weight of the evidence in the record establishes legitimate employer concerns, but not conduct that rises to the level of misconduct in connection with the employment that would disqualify Ms. Jordan for unemployment insurance benefits. Ms. Jordan exhibited poor judgment on December 4, 2018, when she elected to raise her voice in response to a customer who was yelling at her. Rather than raise her voice, Ms. Jordan could have and should have kept her cool and addressed the customer politely. Ms. Jordan could also have summoned a manager to assist her. With that said, in the heat of the moment, without time to ponder the response, an otherwise reasonable person might well have responded to the angry customer in a manner similar to Ms. Jordan's response. The employer presented insufficient evidence to prove prior similar conduct by a preponderance of the evidence. Ms. Caudle was not present for the October 6, 2018 incident and does not know what was said. The employer did not provide testimony from anyone with personal knowledge of that matter and has not produced or testified from the written statements the employer collected in connection with the incident. In short, the employer presented insufficient evidence to rebut Ms. Jordan's testimony concerning the substance and tone of the interaction.

The employer presented insufficient evidence to prove that Ms. Jordan complained to others regarding not receiving breaks or that Ms. Jordan asserted that Ms. Caudle lacked a backbone. Ms. Caudle was not present for the alleged utterances. The employer has not produced testimony from anyone who was present for the alleged utterances. The employer presented insufficient evidence to rebut Ms. Jordan's testimony that she had made no such comment. In any event, a complaint about breaks, a condition of the employment, would in most instances be protected speech under the Fair Labor Standards Act. An assertion that a supervisor lacked a backbone would not rise to the level of offensive speech constituting misconduct. An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. *Henecke v. Iowa Department of Job Service*, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant

disqualification from unemployment benefits, if it serves to undermine a superior's authority. *Deever v. Hawkeye Window Cleaning, Inc.* 447 N.W.2d 418 (Iowa Ct. App. 1989). In the present case, the alleged utterance did not include profanity or patently offensive language.

The employer failed to present sufficient evidence to establish misconduct by a preponderance of the evidence in connection with the matters that predated Ms. Caudle's tenure at the Atlantic Casey's store. Ms. Caudle had no personal knowledge of those matters and did not present testimony from anyone who has such knowledge. The reprimands do not constitute proof of the alleged underlying conduct.

Finally, the absence in October 2018 was for illness, was properly reported to the employer, and therefore was an excused absence under the applicable law.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Jordan was discharged on December 7, 2018 for no disqualifying reason. Accordingly, Ms. Jordan is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The January 9, 2019, reference 01, decision is affirmed. The claimant was discharged on December 7, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs