

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARIA J SMITH**  
Claimant

**APPEAL NO. 11A-UI-09532-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY  
CASEY'S GENERAL STORES**  
Employer

**OC: 06/12/11  
Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the July 17, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 11, 2011. Claimant Maria Smith participated and presented additional testimony through her mother, Melynda Smith. Store Manager Terrie Kono represented the employer.

**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: Maria Smith was employed the Casey's in Colfax as a part-time cashier from 2006 until June 17, 2011, when Store Manager Terrie Kono discharged her from the employment. Ms. Kono was Ms. Smith's immediate supervisor. Ms. Smith most recently performed work for the employer on June 15, 2011.

The incident that prompted the discharge, and the sole incident that factored in the discharge, occurred on June 17, 2011. Ms. Smith was scheduled to work an eight-hour shift that started at 3:00 p.m. At 10:30 to 11:00 a.m., a coworker, Molly Mekemp, telephoned Ms. Smith, said she was not feeling well, and asked Ms. Smith to come into work as soon as possible, preferably by 11:00 a.m. Ms. Smith told Ms. Mekemp that she did not want to come in early because she was already working an eight-hour shift that day. Later in the morning, Ms. Smith received a voice mail message from Store Manager Terrie Kono. Ms. Kono indicated in her message that Ms. Mekemp had fainted and that Ms. Kono needed Ms. Smith to come in "right now."

Ms. Smith called Ms. Kono back at about 11:30 a.m. Ms. Smith told Ms. Kono that she was busy with her family, had just gotten back from the grocery store, and wanted to spend time with her young son. Ms. Kono directed Ms. Smith to come in "right now." When Ms. Smith refused to come in, Ms. Kono cited a written work rule that said there would be times when an employee

might be called in to work an unscheduled shift. Ms. Smith was aware of the provision and had on prior occasions come in to work unscheduled shifts. Ms. Kono was increasingly stern during the call and Ms. Smith became increasingly stern in her refusal to come in early. Toward the end of the conversation, Ms. Smith told Ms. Kono that she was not “freaking” coming in earlier than scheduled and that Ms. Kono could “freaking” write her up or fire her. Ms. Kono responded, “Okay, you’re fired.” Ms. Smith said okay and hung up.

## **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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

On June 17, Ms. Kono directed Ms. Smith to come in early to relieve an employee who was ill and had needed to leave the workplace. The record is unclear why Ms. Kono could not just step in as the manager responsible for the store and complete the shift, but obviously someone had to cover the remainder of Ms. Mekemp's shift. The evidence indicates that the directive in part reasonable and in part unreasonable. It was reasonable for the employer to take steps to cover the shift. The weight of the evidence indicates that the directive was delivered in a heavy-handed manner that contributed to the intensity of Ms. Smith's refusal to comply. The evidence indicates that Ms. Smith refused the directive. Ms. Smith was not at work or on the clock at the time of the refusal, but Ms. Smith was aware that she might be called in to work unscheduled shifts. Ms. Smith's refusal to follow the directive was in part reasonable and in part unreasonable. Ms. Smith was reasonably concerned with the fact that she was already scheduled to work an eight-hour shift. It was reasonable for Ms. Smith not to want to cut short the time she got to spend with her young child and other family members. The manner in which Ms. Smith conveyed her refusal became unreasonable, but did so only after the employer pressed the point. The administrative law judge notes that Ms. Smith was a part-time employee. The significance of this is that Ms. Smith had not made a full-time commitment to the employment and that the part-time nature of the employment signals that Ms. Smith had other demands on her time, which would include spending time with her child. The evidence indicates that Ms. Smith had previously complied with employer requests to work unscheduled hours and that this refusal on June 17 was not part of a pattern of refusal to follow reasonable directives. The administrative law judge concludes that the isolated refusal to come in early and work additional, unscheduled hours did not amount to insubordination under the applicable law.

The administrative law judge will now address the allegation that Ms. Smith employed offensive language or profanity. The weight of the evidence fails to support the employer's allegation that Ms. Smith used profanity. While the word "freaking" is a substitute for offensive term, it is in the same category as "crap" and "darn," neither of which are generally considered profane or offensive. While the ill temper Ms. Smith displayed during the phone call demonstrated poor judgment, it was both a response to the employer's heavy-handed approach and an expression of frustration. Ms. Kono's discourteous utterance and demeanor during Ms. Smith's testimony provided a glimpse of what Ms. Smith likely had to contend with during the June 17 telephone call. Ms. Smith's utterances during the conversation did not constitute misconduct that would disqualify her for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Smith was discharged for no disqualifying reason. Accordingly, Ms. Smith is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Smith.

**DECISION:**

The Agency representative's July 17, 2011, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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