

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DOROTHY A TAYLOR
Claimant

APPEAL NO. 10A-UI-06017-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 03/21/10
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Dorothy Taylor filed a timely appeal from the April 12, 2010, reference 01, decision that denied benefits. Ms. Taylor requested an in-person hearing. After due notice was issued, an in-person hearing was held on June 24, 2010. Ms. Taylor participated and was represented by attorney James Bowers. Mr. Bowers presented testimony through Ms. Taylor and Steve McNeal. Attorney Kenneth Carp represented the employer and presented testimony through Collin Venenga and Laura Bieker. Exhibit A and Department Exhibits D-1 and D-2 were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Dorothy Taylor was employed by Hy-Vee as a full-time clerk from 1971 until March 22, 2010, when Collin Venenga, Store Director, discharged her for rudeness to customers. Mr. Venenga had become Ms. Taylor's immediate supervisor when he became Store Director at the Valley West store in January 2009. For the last 18 years of the employment, Ms. Taylor worked as a customer service clerk.

The final incident that prompted the discharge was a customer complaint Mr. Venenga received by e-mail on March 17, 2010. The customer was complaining about an incident that had occurred a few weeks prior. The customer had purchased two jars of jelly. One jar of jelly rang up at an incorrect price. An employee did a price check. Hy-Vee's policy is to give the item to the customer free of charge if the scanned price is incorrect. An assistant manager attempted to follow the policy and attempted to remove the charge for the item from the customer's grocery bill. The assistant manager erred and actually *added* a charge for a *third* jar of jelly. The customer did not catch the error until after she was finished at the check-out lane. The customer then went to the customer service counter to have the error corrected. There the customer encountered Ms. Taylor. The customer explained the problem to Ms. Taylor.

Ms. Taylor checked to see that the customer only had two jars of jelly and to locate the item that now was erroneously listed *twice* on the customer's receipt. In order to remove the item from the receipt, and to correct the employer's inventory record, Ms. Taylor had to scan the item into her register. Ms. Taylor told the customer she needed to do a price check. The customer indicated that she was in a hurry. Ms. Taylor did the price check, then returned and told the customer that the customer was correct about the price. Ms. Taylor deleted the appropriate items from the customer's receipt and refunded the appropriate amount to the customer. During the transaction, Ms. Taylor had noticed the customer had used a coupon and asked one or more questions to determine whether the scanned item was covered by the coupon. During the interaction with the customer, Ms. Taylor had no input from the other staff with whom the customer had earlier interacted. The cashier who had rung up the item(s) in question was listed on the receipt.

After Mr. Venenga received the customer's e-mailed complaint, he spoke with the customer. Mr. Venenga then reviewed Ms. Taylor's personnel file and reached the tentative decision to discharge her from the employment. On March 22, Mr. Venenga met with Ms. Taylor. Ms. Taylor denied being rude to the customer and explained the steps she had taken to correct the overcharge. Based on this incident and prior customer complaints, Mr. Venenga followed through with discharging Ms. Taylor from the employment.

The next most recent incident that factored into the discharge had occurred on February 2, 2010. On that day, a customer on public assistance (WIC) came to the customer service counter to purchase 14-15 cans of infant formula with WIC coupons. During the transaction, Ms. Taylor told the customer that the purchase would deplete the supply of formula and asked the customer whether she could leave some for other "paying" customers. The implication was that Ms. Taylor wanted the customer using the WIC coupons to leave some of the formula in stock for other customers not paying with public assistance coupons. The customer felt demeaned by the interaction with Ms. Taylor and complained to Mr. Venenga before the customer left the store. Mr. Venenga spoke with Ms. Taylor the next day. Ms. Taylor told Mr. Venenga that she had not intended for her comments to the customer to be demeaning.

In making the decision to discharge Ms. Taylor from the employment, Mr. Venenga also considered a couple anonymous customer complaints about Ms. Taylor. In June 2009, Mr. Venenga received an anonymous customer complaint that Ms. Taylor was always complaining about other customers and was rude. In September 2009, a customer made an anonymous complaint about Ms. Taylor being rude in connection with printing some photos.

In September 2009, the spouse of a Hy-Vee Vice President complained that Ms. Taylor was rude when the woman came to the store to pick up gift cards the store had donated for a local church event. The woman complained that Ms. Taylor had "thrown" the gift cards on the counter.

In July 2009, another employee reported that Ms. Taylor had been rude to a customer.

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 in the record fails to establish misconduct in connection with the final incident that triggered the discharge. The evidence fails to establish that Ms. Taylor was in any way intentionally rude to the customer. The evidence indicates instead that Ms. Taylor was motivated by a desire to perform her duties--and to serve the employer's interests--in a conscientious manner. The administrative law judge notes that the customer who made the

final complaint was complaining about an incident that had occurred some weeks prior. A complaint made that length of time after the incident cannot be given the same weight as a complaint made at the time of the incident or immediately thereafter. The employer failed to present testimony from the complaining customer or from the other store employees who interacted with the customer on the date in question. The weight of the evidence indicates that the customer was most likely upset before she encountered Ms. Taylor. Despite the prior complaints, the administrative law judge cannot *presume* rudeness in connection with the final incident. The administrative law judge notes that Ms. Taylor had worked for the employer for four decades and had worked at the customer service counter for 18 years. The administrative law judge concludes that the employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish misconduct in connection with the final incident that triggered the discharge. Because the evidence fails to establish misconduct in connection with the final incident, the evidence also fails to establish a “current act” of misconduct. Because the evidence fails to establish a “current act” of misconduct, the administrative law judge must conclude that Ms. Taylor’s discharge from the employment does not disqualify her for unemployment insurance benefits. See 871 IAC 24.32(8). Because there was no current act of misconduct, the administrative law judge need not further consider the prior acts.

Ms. Taylor was discharged for no disqualifying reason. Accordingly, Ms. Taylor is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged for benefits paid to Ms. Taylor.

DECISION:

The Agency representative’s April 12, 2010, reference 01, decision is reversed. 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/pjs