

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RACHEL C NOEL
Claimant

APPEAL NO. 10A-UI-03852-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

**Original Claim: 02/07/10
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated March 2, 2010, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice was issued, a telephone hearing was conducted on April 27, 2010. The claimant participated personally. The employer participated by Ms. Molli Brandt, manager.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Rachel Noel was employed as a full-time cashier for Casey's Marketing Company from April 27, 2009, until February 7, 2010, when she discharged from employment.

The claimant was discharged because the store manager, Ms. Brandt, believed that Ms. Noel was violating a company policy and state law by smoking in the facility's bathroom. The claimant had been previously warned for the offense and company employees reported they believed Ms. Noel might be again violating the policy, as smoke and cigarette butts had been found in the lavatory. The claimant was not observed violating the rule after being warned, but the manager suspected that the rule was being violated and discharged the claimant. Ms. Noel denied violating the rule both at the time she was accused and at the time of hearing.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is not.

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 insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

Allegations of misconduct 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 Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In this case, the evidence establishes the claimant was discharged based upon the manager's suspicions that Ms. Noel may be violating the non-smoking policy. Unidentified company employees had reported to Ms. Brandt that they believed Ms. Noel may be violating the policy. Based upon their unsubstantiated statements, as well as the warning that had previously been

served upon the claimant, the store manager determined that the rule had been violated and discharged Ms. Noel. At the time of hearing, the employer provided hearsay evidence that Ms. Noel may have violated the rule. In contrast, the claimant appeared personally and provided sworn, firsthand testimony denying that the rule had been violating since she has been previously warned.

While hearsay evidence is admissible in administrative proceedings, it cannot be accorded the same weight as sworn, direct testimony. The hearsay evidence in the record is not sufficient to establish intentional disqualifying misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's decision dated March 2, 2010, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

tpn/kjw