

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JUDITH A OWENS**  
Claimant

**APPEAL NO. 10A-UI-13031-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**VON MAUR INC**  
Employer

**OC: 08/15/10**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Employer filed a timely appeal from a representative's decision dated September 9, 2010, reference 02, which found claimant eligible to receive unemployment insurance benefits based upon her separation from Von Maur, Inc. After due notice, a telephone hearing was held on November 2, 2010. Claimant participated personally. The employer participated by Ms. Leann Gudenkauf, Store Manager.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having considered all of the evidence in the record, the administrative law judge finds: Judith Owens was employed by Von Maur, Inc. from December 19, 1996 until August 5, 2010 when she was discharged from employment. Ms. Owens held the position of full-time sales associate and was paid by the hour. Her immediate supervisor was the store manager, Ms. Gudenkauf.

A decision was made to terminate Ms. Owens when a company customer alleged that Ms. Owens had refused to provide assistance to the customer and asked the customer to go to another department of the store to obtain the assistance needed. Although claimant denied the allegation, a decision was made to terminate Ms. Owens as she had been previously warned about the manner that she had assisted customers.

During the incident in question that took place on August 1, 2010, Ms. Owens was engaged in measuring trousers for alteration with another customer when approached by a customer desiring a refund. Although Ms. Owens explained that she was engaged with another customer and would help the second customer as soon as possible, the customer became upset. When Ms. Owens suggested that employees in a different department could promptly take care of the customer's request, the customer became angry and subsequently lodged a complaint.

## REASONING AND CONCLUSIONS OF LAW:

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

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 serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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. of Appeals 1992).

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 unable to furnish evidence to corroborate the allegations, misconduct cannot be established. See 871 IAC 24.32(4).

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.

In this case the employer made a management decision to terminate Ms. Owens based upon the complaint of a disgruntled customer who alleged that Ms. Owens had not been helpful and had directed her to a different department for service. Ms. Owens denied the allegation when it was brought to her attention by her employer. Ms. Owens testified at the hearing that she was not intentionally rude or discourteous but explained to the customer that she was already waiting on a customer and that she would be with the customer as soon as possible and offered the customer the alternative of going to a different department for quicker service. The administrative law judge finds the claimant's testimony to be credible and not inherently improbable. The administrative law judge must give more weight to the claimant's sworn testimony than the hearsay testimony offered by the employer.

While hearsay is admissible in administrative proceedings, it cannot be accorded the same weight as sworn, direct testimony. Ms. Owens has provided a reasonable explanation about the incident in question and is credible.

While the decision to terminate the claimant may have been a sound decision from a management viewpoint, there is not sufficient evidence to warrant the denial of unemployment insurance benefits. Benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated September 9, 2010, reference 02, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

pjs/pjs