

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES H WICK
Claimant

APPEAL NO. 11A-UI-05747-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 03/27/11
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

James Wick filed a timely appeal from the April 20, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 23, 2011. Mr. Wick participated personally and was represented by attorney Cecelia Ibson. Alice Rose Thatch of Corporate Cost Control represented the employer and presented testimony through James Frank, Kim Jaber, and Roxanne Martinek. Exhibits Two through Eight were received into evidence.

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: James Wick was employed by Hy-Vee as a full-time Kitchen Manager until April 1, 2011, when Kim Jaber, Manager of Perishables discharged him for theft of company property. Ms. Jaber was Mr. Wick's immediate supervisor.

The final incidents that triggered the discharge occurred on March 30, 2011. On that day, Ms. Jaber witnessed Mr. Wick consume a container of orange juice without paying for it and later witnessed Mr. Wick consume a meal without paying for it. The employer's written food service policies explicitly prohibited employees from consuming food without first paying for it. The same policy prohibited employees from serving themselves. In other words, a staff member other than the person consuming the food was to serve the food and ring up the food. Mr. Wick was aware of the policy and had signed his acknowledgment of the written policy. In addition, Mr. Wick was charged with enforcing the policy in his department and setting an example for other employees. The employer had additional policies regarding honesty and paying ahead of time for all items to be consumed and/or removed from the store. The employer had properly notified Mr. Wick of these additional policies. When the employer confronted and interviewed Mr. Wick about the behavior, Mr. Wick provided a written statement in which he admitted to consuming six containers of orange juice without paying for it and consuming four meals without

paying for them. Ms. Jaber discharged Mr. Wick based on the conduct she observed and the additional conduct to which Mr. Wick admitted.

The day before the discharge, Mr. Wick had returned to work after being hospitalized for severe chronic heart failure. Mr. Wick returned with a 10-pound lifting restriction. The lifting restriction prevented Mr. Wick from performing a significant number of the duties he had performed as Kitchen Manager prior to the diagnosis. Nonetheless, the employer was willing to accommodate the restrictions so that Mr. Wick could continue in the employment and indicated as much to Mr. Wick.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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 § 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).

While Mr. Wick's medical restriction impacted his ability to perform his regular duties, the weight of the evidence establishes that the employer was willing to accommodate the restriction and that Mr. Wick's employment would not have ended absent substantial misconduct in connection with the employment. Mr. Wick knowingly and intentionally violated the employer's food service policies and other policies twice on March 30, 2011. Mr. Wick admitted to several additional violations of the same policy. Mr. Wick's testimony that he “forgot” to pay for the food items ahead of time is simply not credible. Prior to the discharge, Mr. Wick provided the employer with information indicating that he had in fact engaged in a pattern of violating the employer's food service policies. The conduct did indeed constitute theft and Mr. Wick knew this at the time he engaged in the conduct. To make matters worse, Mr. Wick was the person responsible for enforcing the policy and modeling compliance. The conduct was in willful and wanton disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Wick was discharged for misconduct. Accordingly, Mr. Wick is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Wick.

DECISION:

The Agency representative's April 20, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment insurance benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged for benefits paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs