

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DANIEL E PLEGER**  
Claimant

**APPEAL NO. 11A-UI-15046-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**J AND J PETERSEN INC**  
Employer

**OC: 10/09/11  
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed an appeal from a decision of a representative dated November 10, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on December 14, 2011. Claimant participated. Employer participated by Jeff Petersen, owner, and Jerrod Frahm, manager. The record consists of the testimony of Jeff Petersen; the testimony of Jerrod Frahm; the testimony of Daniel Pleger; and Employer's Exhibits 1-4.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a supermarket located in Gowrie, Iowa. The claimant was hired in late May 2010 as a part time checker and stocker. His last day of work was October 11, 2011. He was terminated on October 11, 2011.

The incident that led to the claimant's termination occurred on either October 7, 2011, or October 8, 2011. Jeff Petersen, the owner, was gone for the weekend. He received reports from several employees that two customers had left the store angry at approximately 3:00 p.m. The reason the customers were angry was that the claimant did not wait on them in the deli section. The customers reported that the claimant ignored them and was talking on his cell phone at the time. The claimant does not remember seeing any customers and that he was working, not talking on his cell phone.

Approximately two days before this incident occurred there had been a meeting with the claimant and Mr. Petersen and Jerrod Frahm, a manager. The purpose of the meeting was to discuss customer service issues with the claimant. The claimant was counseled about his slow work speed; his inappropriate language; his tone of voice with women customers; and talking

about personal matters with customers. The employer was also concerned about two absences for illness that were considered suspicious by the employer. The employer felt its business was being harmed by the claimant because he was not liked by the customers. The claimant seemed to take the criticism well. He then went downstairs and told other employees that the employer should just fire him so that he could collect unemployment. The employer saw no improvement in the claimant's behavior after the meeting.

**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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. 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 on such past act or acts. The termination of employment must be based on a current act.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also

Greene v. EAB, 426 N.W. 2d 659 (Iowa App. 1988) The employer has the burden of proof to establish misconduct.

The issue in this case is whether there is sufficient evidence to show that the claimant was discharged for a current act of misconduct. The claimant was terminated after Jeff Petersen, received a report from several employees that two customers had left the store and were angry because the claimant refused to wait on them in the deli section. Mr. Petersen spoke to the employees and the customers. This event occurred on either a Friday or Saturday prior to the claimant's termination on October 11, 2011.

The only sworn testimony from an eyewitness to what occurred on either Friday or Saturday is from the claimant. Mr. Petersen could only testify to what he was told by other employees and the customers. There are no statements from the customers. There is no testimony from employees who were actually present. In cases of alleged misconduct, hearsay evidence is insufficient to establish misconduct. Although the administrative law judge has some reservations about the credibility of the claimant's testimony, that testimony cannot be weighed against the testimony of the customers or the employees who were actually present.

Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code Sec. 17A.14(1). 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 Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In Schmitz v. Iowa Department of Human Services, 461 N.W.2d 603, 607-608 (Iowa App. 1990), the Court required evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test, requiring agencies to employ a "common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better evidence; (4) the need for precision; (5) the administrative policy to be fulfilled." Id. At 608.

The testimony from the employer showed that there were good business reasons for terminating the claimant's employment. Good business reasons for termination do not always mean that an employee is disqualified from receiving unemployment insurance benefits. In this case, there was insufficient evidence to establish a current act of misconduct, which is what must be shown to disqualify an individual from receiving benefits. Benefits are allowed if the claimant is otherwise eligible.

**DECISION:**

The decision of the representative dated November 10, 2011, reference 01, is affirmed. Unemployment insurance benefits are allowed provided claimant is otherwise eligible.

---

Vicki L. Seeck  
Administrative Law Judge

---

Decision Dated and Mailed

vls/pjs