

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RAEA J KELLY
Claimant

APPEAL NO: 10A-UI-02318-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KWIK TRIP INC
Employer

OC: 01/03/10
Claimant: Respondent (1)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The employer appealed a representative's February 4, 2010 decision (reference 01) that concluded the claimant was qualified to receive benefits and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. A telephone hearing was held on March 26, 2010. The claimant participated in the hearing. Dave Wolter, the district lead, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on February 14, 2002. On August 28 2009, the claimant began working again as a shift leader. The store manager supervised the claimant.

After the claimant began working as a shift leader again, the employer gave the claimant a warning on November 10, 2009. The claimant received the November 10 warning because of on-going attendance issues. The claimant had been missing work and reported to work late because she was involved in a divorce and custody battle that required her to go to court and to meet with her attorney. On October 31, the claimant left work early at 3:15 p.m. but the next day she recorded she had worked until 4:15 p.m. the day before. When the employer gave the claimant the November 10 warning in part because she recorded she worked an hour more than she had. After receiving the November 10 warning, the claimant understood that if she had any more performance issues or violated any policy, the employer could discharge her.

After receiving the November 10 warning, the claimant did not have any more attendance problems. On November 30 and December 2, the claimant reported to work with her nose piercing in. After the claimant clocked in and realized she had her nose piercing in, she took it out. The employer does not allow employees to work with nose piercings. Someone may have told the claimant she had the nose piercing in.

On December 12, the claimant was in the office handling cash when there was a problem with a customer. The claimant put the cash in a deposit bag and put the money and bag in a drawer. When she left the office, she locked the door. Although the store manager talked to the claimant about leaving the money unattended, the claimant had observed the store manager do the same thing. On December 26, the employer noticed on a video the claimant had items rung up during her shift by other employees. The claimant paid for items before she left work. The employer's policy informs employees they are to ring up items they want to take home at the end of their shift and to pay for them at that time.

On January 1, the store manager saw on a video that during her shift the claimant got out her cell phone and then gave it to a co-worker who was not working. The store manager reported the claimant used her cell phone to text someone before she gave it to the co-worker. The claimant admitted she got out her cell phone when she was working because a co-worker wanted a phone number the claimant had on her cell phone. The claimant retrieved her cell phone from her purse, made sure it was clear and then gave the cell phone to the co-worker. The claimant understood the employer did not allow employees to use cell phones at work except on breaks. The claimant talked to the store manager and understood that if her daughter called, the claimant, if possible, could take a break and talk to her daughter on her cell phone.

On January 1, the claimant's daughter called her at work. When her daughter called other employees were still at work. The claimant excused herself and talked to her daughter in the break room. Instead of being gone on break for 10 minutes, the claimant was on break for 16 minutes. Later, after the claimant sent employees home early, she grabbed a snack to eat. Although the employer's policy does not allow employees to eat in the register area, the claimant ate the snack, but no customers were in the store. The store manager observed the above policy violations on January 2 when she reviewed the January 1 video tape.

On January 7, 2010, the employer discharged the claimant for policy violations and performance issues.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

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. 871 IAC 24.32(8).

The claimant knew or should have known her job was in jeopardy after she received the November 10, 2009 written warning. As a result of the written warning, the claimant resolved her attendance issues.

The employer established business reasons for discharging the claimant. While the claimant did not exactly follow some of the employer's rules, the facts do not establish that she intentionally violated any rule. On January 1, the claimant did not use her cell phone at work in violation of the employer's policy, she just got it out, made sure it was clear and then gave it to a co-worker to use. The co-worker was not working. Since the employer did not have a record of if or when the claimant had previously been warned about taking extended breaks and eating by the cash register, these isolated incidents on January 1 do not establish that claimant intentionally or substantially disregarded the employer interests or rules. The evidence does not establish that the claimant committed work-connected misconduct. As of January 3, 2010, the claimant is qualified to receive benefits.

DECISION:

The representative's February 4, 2010 decision (reference 01) is affirmed. The employer discharged the claimant for business reasons, but the claimant did not commit work-connected misconduct. As of January 3, 2010, the claimant is qualified to receive benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css