

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VENGILYN A SCHUMACHER

Claimant

APPEAL NO. 16A-UI-02211-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 01/24/16

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Vengilyn Schumacher filed a timely appeal from the February 18, 2016, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Ms. Schumacher had been discharged on January 22, 2016 for violation of a known company policy. Ms. Schumacher requested an in-person hearing. After due notice was issued, an in-person hearing was held at the Dubuque Workforce Development Center on June 22, 2016. Ms. Schumacher participated. Nicole Collins represented the employer and presented additional testimony through Linda Riege. Tagalog-English interpreter Javelyn McCaley of CTS Language Link assisted with the hearing. Exhibits One, Two, Four through Eight, and B were received into evidence.

ISSUE:

Whether Ms. Schumacher was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Vengilyn Schumacher began her employment with Casey's in 2013 as a part-time cleaner and stocker. Ms. Schumacher worked at the employer's Maquoketa store, which is open 24 hours a day. In February 2015, Store Manager Nicole Collins promoted Ms. Schumacher to a full-time cleaning and cashiering position. By all accounts, Ms. Schumacher was a hardworking employee. Ms. Schumacher's regular hours were 5:00 p.m. to 4:00 a.m., three or four nights per week. Ms. Collins was Ms. Schumacher's immediate supervisor during the last two and a half years of Ms. Schumacher's employment. Ms. Collins discharged Ms. Schumacher from the employment on the morning of January 21, 2016, in response to Ms. Schumacher's refusal to follow the employer's cell phone policy.

The employer's written cell phone policy is set forth in an employee handbook. The employer keeps a copy of the handbook at the Casey's store. Ms. Schumacher signed her acknowledgement of the handbook at the start of her employment and had access to the handbook throughout the employment. The cell policy prohibits use of cell phones outside of

breaks, but does not explicitly prohibit possession of cell phones in the workplace. The cell policy states as follows:

In order for employees to give customers undivided attention and to maintain a professional atmosphere in the stores, the use of cellular telephones, pagers and similar technology are not permitted to be used in the store while employees are on duty, which includes sending or receiving text messages. Video or audio recording and taking pictures of any kind are not allowed at Casey's without express business authorization from a supervisor. The store telephone number may be used for family emergencies. Any employee found to be in violation of this policy will be subject to corrective action, up to and including termination.

Prior to January 20, 2016, Ms. Collins did not prohibit cell phone possession or reasonable cell phone use. Ms. Collins would mention cell phone use at bi-monthly staff meetings. Ms. Collins tolerated reasonable use of cell phones so long as assigned work got done.

When Ms. Schumacher appeared for her January 19-20, 2016 shift, she learned that Ms. Collins had changed her approach to enforcing the cell phone policy. Ms. Collins had prepared a note for employees to review and sign. The note indicated that employees would thereafter have to leave their cell phones in their vehicles, in their purses, or in a designated basket in the office. The note indicated that family members who needed to contact employees during work hours could contact the employee at the store's telephone numbers. Ms. Schumacher disagreed with the new requirement and kept her phone with her during her shift. Ms. Schumacher wanted to keep her phone nearby in case her husband or her children needed her. Ms. Schumacher's husband suffers from multiple health issues. Ms. Schumacher and her husband have two children, aged 12 and seven years old. Ms. Schumacher also was uncomfortable with leaving her cell phone in the basket in the office out of concern that other staff might access her phone or the information contained therein.

When Ms. Collins arrived at the Casey's store shortly before 4:00 a.m. on January 20, 2016, Ms. Schumacher was running the cash register. Ms. Collins observed that Ms. Schumacher had her cell phone in her pocket. Ms. Collins directed Ms. Schumacher to put her cell phone away. Ms. Schumacher told Ms. Collins that she would not follow the new rule. About 10 minutes before Ms. Schumacher's shift was to end, Ms. Schumacher went out to start her car so it could warm up before her trip home. Though Ms. Schumacher worked in Maquoketa, she lived 12 miles away in Monmouth. When her car would not start, Ms. Schumacher used her cell phone to leave a message for her husband. Ms. Schumacher knew that her husband would be leaving home shortly to go to work. Shortly thereafter, Ms. Schumacher was in the store when she received a telephone call from her husband. Ms. Schumacher stepped outside to finish the call. When Ms. Schumacher finished the call, Ms. Collins reminded Ms. Schumacher of the new rule. Ms. Collins told Ms. Schumacher that her cell phone needed to be left her car, in her purse or in the designated basket in the office. Ms. Schumacher told Ms. Collins that she was not going to follow the rule because she had kids. Ms. Schumacher added that Ms. Collins could fire her, but she was not going to follow the policy. Ms. Collins told Ms. Schumacher that the store had two phones that Ms. Schumacher's husband could use if he needed to get ahold of her. Ms. Schumacher repeated that she was not going to follow the policy.

When Ms. Collins arrived at the Casey's store shortly before 4:00 a.m. on January 21, 2016, Ms. Schumacher was cleaning in the kitchen. Ms. Schumacher had her cell phone sitting out on a cookie sheet to keep it nearby, but was not using the cell phone. Ms. Collins told

Ms. Schumacher that her cell phone needed to be put away. When Ms. Schumacher refused to comply, Ms. Collins summoned Ms. Schumacher to the office and discharged her from the employment.

Ms. Schumacher is originally from the Philippines. Her native language is Tagalog. Ms. Schumacher was able to communicate in fluent English in the course of performing her work duties. At the appeal hearing, Ms. Schumacher indicated that she could read the employer's exhibits, written in English, without difficulty. During the appeal hearing, Ms. Schumacher demonstrated that she is indeed fluent in English. Ms. Schumacher frequently answered in English before the interpreter had an opportunity to interpret the administrative law judge's questions into Tagalog. Ms. Schumacher occasionally corrected the interpreter when the interpreter interpreted Ms. Schumacher's answers from Tagalog into English.

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee’s failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer’s request in light of the circumstances, along with the worker’s reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence establishes that the steps Ms. Collins took to enforce the employer’s written cell phone policy were reasonable under the circumstances. Though Ms. Collins had not strictly enforced the policy prior to January 19, 2016, it was her duty as store manager to enforce the policy and she was acting within her authority in enforcing the policy. Casey’s written cell phone policy was reasonable. The employer reasonably expected employees to focus on their work duties, which included serving customers. While the employer does not assert that Ms. Schumacher neglected her work duties, that does not make the employer’s cell phone policy any less reasonable. The Casey’s cell phone policy explicitly authorizes employees and their family members to use the employer’s phones in connection with bonafide emergencies. Ms. Schumacher raised her family situation as a concern and as justification for keeping her phone on her person. While the concern for her family’s welfare is commendable, the weight of the evidence establishes that it was not necessary for Ms. Schumacher to have her cell phone on her person during work hours when the employer provided her with access to the store phone. In addition, the employer’s policy did not prohibit Ms. Schumacher from using her phone during breaks. Ms. Schumacher acted unreasonably when she made a repeated blanket refusal to comply Ms. Collins’ reasonable directives to put the phone away. Ms. Schumacher’s refusal was phrased as a direct challenge to Ms. Collins’ supervisory authority and constituted misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Schumacher was discharged for misconduct in connection with the employment. Accordingly, Ms. Schumacher is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer’s account shall not be charged for benefits.

DECISION:

The February 18, 2016, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs