

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PATRICK A KELLY
Claimant

APPEAL NO. 09A-UI-02710-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 01/19/09
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Patrick Kelly filed a timely appeal from the February 16, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 17, 2009. Mr. Kelly participated. Tim Speir of Unemployment Insurance Services represented the employer and presented testimony through Pat Oherking, Store Director, and Jerry Semac, Night Stock Manager. Exhibits One through Eight were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Patrick Kelly was employed by Hy-Vee as a full-time night stocker from August 30, 2008 until January 18, 2009, when Pat Oherking, Store Director, discharged him for repeatedly failing to perform his stocking duties as trained and directed. Mr. Kelly's immediate supervisor was Jerry Semac, Night Stock Manager.

The final incident that prompted the discharge occurred on January 16, 2009, when Mr. Kelly failed to properly stock his assigned aisle(s). Mr. Kelly stocked one row of a pancake mix product, but left a second row empty. When Mr. Semac confronted Mr. Kelly about inadequately stocking the product, Mr. Kelly acknowledged he had chosen speed over accuracy. Mr. Semac had stocked the same aisle many times before. Mr. Kelly had received adequate and proper training to perform his stocking duties.

The final incident of carelessness followed prior similar incidents. On October 1, Mr. Semac located product in a back room back stock area that Mr. Kelly had placed there instead of fully stocking the product on the store shelf where the customers could see it and buy it. On the same day, Mr. Semac documented a verbal reprimand that he had issued to Mr. Kelly. On October 21, Mr. Semac once again located product in a back room back stock area that Mr. Kelly had placed there instead of fully stocking the product on the store shelf where the

customers could see it and buy it. Mr. Semac issued a written reprimand. Mr. Semac directed Mr. Kelly to fully stock the shelf and to ask questions if he had any about how to perform his duties. On October 22, Mr. Semac discovered that Mr. Kelly had failed to rotate some granola bars so that those with the earliest expiration date would be purchased first. Mr. Kelly misrepresented to Mr. Semac that he had rotated the product. Mr. Kelly had decided he did not need to rotate the product because it was a fast seller and another employee would probably rotate the product in the near future. Mr. Semac issued a written reprimand.

Mr. Kelly was in the habit of challenging Mr. Semac's authority when Mr. Semac attempted to direct his work. Mr. Kelly became argumentative with Mr. Semac at the time Mr. Semac gave the above reprimands/counselings. On November 14, Store Manager Pat Oherking issued a reprimand to Mr. Kelly for this insubordinate behavior. Mr. Kelly asserted that Mr. Semac had given conflicting or inconsistent instructions for stocking product on the store shelves. Mr. Oherking followed up with Mr. Semac and determined that Mr. Semac had been following standardized stocking procedure and had directed Mr. Kelly to do the same. In connection with the reprimand, Mr. Oherking directed Mr. Kelly to amend his conduct or face termination of the employment.

On December 23, Mr. Semac once again discovered that Mr. Kelly was performing his stocking duties in a sloppy, careless fashion. Mr. Semac discovered that Mr. Kelly was failing to check the lids of product to make certain they were on tight. In addition, Mr. Kelly had left debris in the middle of the aisle where he or a customer could trip over it. Mr. Semac pulled Mr. Kelly off stocking duties and sent him to work at the front of the store.

REASONING AND CONCLUSIONS OF LAW:

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.

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).

In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

This case is remarkably similar to the Gilliam case. The weight of the evidence indicates that Mr. Kelly repeatedly failed to follow the training he had received and the instructions he had received from Mr. Semac about fully and properly stocking product on the store shelves. What the employer asked and expected of Mr. Kelly was rather basic. Mr. Kelly's failure to follow instructions about properly stocking the shelves was attributable only to Mr. Kelly's willful refusal to follow basic instructions and willful neglect of his assigned duties. The weight of the evidence

indicates there is no merit whatsoever to Mr. Kelly's assertion that Mr. Semac was an unstable taskmaster who gave inconsistent directives. Likewise, there is no merit to Mr. Kelly's assertion that Mr. Semac only reprimanded him because Mr. Semac was out to get him. Mr. Kelly unreasonably and repeatedly failed to follow the reasonable directives of the employer. Mr. Kelly engaged in a pattern of negligence so recurrent as to indicate willful disregard of the interests of the employer. Each matter, the insubordination and the negligence, constituted misconduct in connection with the employment that disqualifies Mr. Kelly for unemployment insurance benefits. Mr. Kelly 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. Kelly.

DECISION:

The Agency representative's February 16, 2009, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs