

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PARKS, CHERYL
Claimant

APPEAL NO. 12A-UI-00444-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 12/11/11
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Cheryl Parks filed a timely appeal from the January 10, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 9, 2012. Claimant participated. Susan Mirise of Corporate Cost Control represented the employer and presented testimony through Brett Shelman and Tina Witthoft.

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: Cheryl Parks was employed by Hy-Vee in Mount Pleasant from 2003 until December 16, 2011, when Brett Shelman, Manager of Perishables, discharged her from the employment. During the last four years of the employment, Ms. Parks was an assistant manager. Ms. Parks worked the overnight shift, 11:00 p.m. to 7:00 a.m.

A week prior to the discharge, Mr. Shelman had been made aware that Ms. Parks had been taking extended breaks outside the store in her car. On the last day of the employment, Mr. Shelman arrived at the store shortly before 6:00 a.m. and observed Ms. Parks in her car from the store. Mr. Shelman accessed the store's video surveillance records to see how many breaks Ms. Parks had taken during the shift and to see how long those breaks had been. Ms. Parks had taken four breaks totaling 45 minutes. Ms. Parks was allowed paid breaks totaling 30 minutes during the shift, as indicated in the employee handbook and posted by the time clock. In measuring Ms. Parks' breaks, Mr. Shelman measured from the time she exited the front door of the store and the time she re-entered the store. Ms. Parks took her first break from 12:01 a.m. to 12:06 a.m. While this started a trip to the car to find her box cutter, Ms. Parks extended the time away from the store so that she could smoke a cigarette in her car. Ms. Parks took a second break from 1:30 a.m. to 1:31 a.m. Ms. Parks took a third break from 3:38 a.m. to 3:53 a.m. Ms. Parks took a fourth break at 5:49 to 6:05 a.m. Mr. Shelman did not review other surveillance from other days to see what that showed regarding Ms. Parks' breaks.

At the end of Ms. Parks' shift, Mr. Shelman summoned Ms. Parks to a meeting. Tina Witthoft, Manager of Store Operations was also present. Mr. Shelman asked Ms. Parks how many breaks she had taken during the shift and how long they had been. Ms. Parks answered that she had take three 10-minute breaks. Mr. Shelman repeated the question and got the same answer. Mr. Shelman then showed Ms. Parks the video surveillance record that indicated four breaks lasting a total of 45 minutes. Ms. Parks then said that "everyone says that," meaning everyone would say when questioned that they took three 10-minute breaks. Mr. Shelman discharged Ms. Parks from the employment based on what he perceived to be Ms. Parks' intentional dishonesty in response to his questions about her breaks. Ms. Parks, as a member of store management, was responsible for enforcing the employer's break policy.

Ms. Parks is a smoker and all the breaks during the final shift involved smoking a cigarette. Aside from the trip to the car to get the box cutter, there was no other work-related purpose for Ms. Parks' trips to her car during the final shift.

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).

If the conduct in question was merely the unauthorized expansion of break times during the final shift, the administrative law judge would have to conclude that Ms. Parks' conduct did not rise to the level of misconduct that would disqualify her for unemployment insurance benefits. However, the employer made that valid point that Ms. Parks' conduct had an additional component. That was her dishonesty to Mr. Shelman when he asked her about her breaks. Ms. Parks made a number of assertions at the hearing that appear to have been disingenuous. One concerned having to deal with the donuts on the last shift. Another was her assertion that she was not responsible for enforcing the break policy. These disingenuous statements at the hearing lend credibility to the employer's assertions that Ms. Parks was intentionally dishonest with the employer when the employer questioned her about her breaks. As a member of management, Ms. Parks owed a heightened duty of trustworthiness. Ms. Parks' dishonesty 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 the claimant was discharged for misconduct. Accordingly, the claimant 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 paid to the claimant.

DECISION:

The Agency representative's January 10, 2012, 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/css