IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PATRICIA M NOLL
Claimant

HY-VEE INC
Employer

APPEAL NO. 12A-UI-07728-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/20/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 21, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was started on August 9, 2012 and concluded on August 21, 2012. Claimant Patricia Noll participated on both dates and, on August 21, was represented by attorney Jean Pfeiffer. John Fiorelli of Corporate Cost Control represented the employer and presented testimony through Steve Graham, Human Resources Manager. Exhibits One through Seven were received into evidence.

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: Patricia Noll was employed by Hy-Vee in Muscatine as a full-time customer service clerk from 1983 until May 18, 2012, when Kasey O'Kelly, Store Director, discharged her from the employment. Mr. O'Kelly was relatively new to the Muscatine store at the time. Ms. Noll's usual work hours were 6:00 a.m. to 2:30 p.m., Monday through Friday.

The chain of events that triggered the discharge began on May 14, 2012. The employer chose that day to begin formally enforcing store policies with Ms. Noll. On May 14, Kyle Greenleaf, Manager of Store Operations, allegedly monitored Ms. Noll's breaks and concluded that she was taking excessive and unauthorized breaks. Under store policy, Ms. Noll was allowed 30 minutes of break time during her 6:00 a.m. to 2:30 p.m. shift. Ms. Noll was allowed to split the 30 minutes into two 15-minute breaks. Ms. Noll was not allowed to further divide her break time. Ms. Noll was aware of the store's written break policy. On May 14, Mr. Greenleaf documented a 32-minute break from 10:12 a.m. to 10:44 a.m. Mr. Greenleaf also documented additional cigarette breaks at 9:27 a.m. (20 minutes), 11:31 a.m. (12 minutes), 1:07 p.m. (6 minutes). As part of Ms. Noll's work duties, she would take bags of empty cans out the back door and into a semi trailer. The employer allowed employees to smoke outside the back door and in the can trailer. Some of the time Mr. Greenleaf documented as break time was time

when Ms. Noll was outside the store moving empty cans to the semi trailer where they were stored.

Also on May 14, Manager of Store Operations Al Guerdet spoke to Ms. Noll three times regarding a soft drink she had in her work station. Under store policy, employees were not allowed to have food or beverages in their work areas. Ms. Noll brought the soft drink back to her work area after a break. In June 2011, Ms. Noll had provided the employer with a note from her doctor indicating that she needed to be able to drink *water* during her shift. The employer maintained a water fountain at the front of the store for employees and customers to use. The drinking fountain was not far from Ms. Noll's work station and Ms. Noll was allowed to use it as needed. After Mr. Guerdet spoke to Ms. Noll the first time regarding her soft drink, Ms. Noll moved the soft drink to another place in her work area. After Mr. Guerdet spoke to Ms. Noll a second time, Ms. Noll again moved the soft drink to another spot within her work area.

Also on May 14, Ms. Noll twice shopped while on the clock in violation of written company policy. Around 7:00 a.m., Ms. Noll bought birthday balloons for a coworker. Around noon, Ms. Noll bought Midol for a coworker. Ms. Noll knew it was against company policy to shop while on the clock.

On May 17, Store Director O'Kelly, Manager of Operations Greenleaf, and Human Resources Manager Graham met with Ms. Noll to discuss the May 14 matters. Mr. Greenleaf had prepared a separate written reprimand for the breaks issue, for the soft drink issue, and for the shopping on the clock issue. Mr. O'Kelly told Ms. Noll that her attendance needed to change and that he could not tolerate anything less. The comment was in reference to Ms. Noll's alleged excessive breaks. Ms. Noll responded, "This is just me. I am who I am and have been this way my entire employment." Ms. Noll also said that she would "try to do better, but I am who I am—give me a year and I will be retired." Mr. O'Kelly explained that Ms. Noll could not be defiant of the rules prohibiting beverages in the work area. The employer presented Ms. Noll with the three written reprimands for her signature. Ms. Noll asked whether she was required to sign the reprimands and the employer said no. Ms. Noll then stated she would not sign the documents. Ms. Noll then said, "I have to go. Is this meeting over with?" During the meeting, Mr. O'Kelly told Ms. Noll that if there was one more write up, she was gone.

May 18, Mr. O'Kelly and Mr. Graham met again with Ms. Noll. Mr. O'Kelly told Ms. Noll that he was not one to "sweep dust under a rug," that many changes needed to be implemented during the coming weeks, and that he was not going to let Ms. Noll "buck" him. Mr. O'Kelly told Ms. Noll that she did good work, but that he had decided to let her go. Ms. Noll told Mr. O'Kelly that she only had a little more than a year before her planned retirement. This did not dissuade Mr. O'Kelly from moving forward with the discharge.

In making the decision to discharge Ms. Noll from the employment, the employer considered prior matters. In early 2009, the employer had asked Ms. Noll and other full-time employees to start working on weekends, when the store was busiest. Ms. Noll refused.

In making the decision to discharge Ms. Noll from the employment, the employer also considered a December 2011 reprimand that was based on Ms. Noll's interaction with a dry cleaning customer. The customer was upset and offended by Ms. Noll's reference to the customer's clothing having been purchased at Goodwill. The customer had brought the clothing to Hy-Vee in a Goodwill bag. Ms. Noll had not intended to upset or offend the customer.

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:
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> 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.
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> 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).

The employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence to establish misconduct in connection with the employment that would disqualify Ms. Noll for unemployment insurance benefits. With regard to the break situation, Ms. Noll testified that at least some of the time that Mr. Greenleaf called break time was when Ms. Noll was outside moving cans to the semi trailer. The employer has failed to present testimony from Mr. Greenleaf or anyone else to rebut that testimony. Even if Ms. Noll did take unauthorized breaks on May 14, this appears to be the first day the employer decided to formally enforce the break policy with Ms. Noll.

With regard to the drink policy, the employer again has failed to present sufficient evidence to establish misconduct. We do not know what exactly Mr. Guerdet said to Ms. Noll. The employer had the ability to present testimony through Mr. Guerdet and did not do so. This appears to be the first time the employer formally enforced the no drink policy with Ms. Noll.

With regard to the shopping on the clock on May 14, the evidence indicates one instance in which Ms. Noll bought a balloon for a coworker's birthday celebration and another instance when Ms. Noll bought Midol for a coworker in need. While these were violations of the employer's no shopping policy, there were attending mitigating circumstances. In addition, this again appears to have been the first instance of the employer formally enforcing the no shopping policy with Ms. Noll.

A number of factors help to put Ms. Noll's situation in its proper context. Ms. Noll had worked for the employer for 29 years and apparently had no reprimands prior to May 14, 2012, other than the December 2011 reprimand concerning her interaction with the dry cleaning customer. Mr. O'Kelly acknowledged at the time he discharged Ms. Noll from the employment that she was a good worker. The employer appears to have suddenly decided on May 14 to begin enforcing policies with Ms. Noll that the employer had not previously enforced with her. The way the employer went about doing that begs the question of whether there was more than mere policy enforcement motivating the employer's actions. The employer apparently had at least three managers monitoring Ms. Noll's conduct on May 14. The sudden, simultaneous issuance of three reprimands, along with the shape-up-or-ship-out meeting and almost immediate discharge, again call into question whether there was more to the employer's agenda than mere policy enforcement. Ms. Noll may have been set in her ways, in part due to the employer's previous lax enforcement of its work rules with her, but the employer appears to have discounted Ms. Noll's statement that she would try to adhere to the policies as instructed at the May 17 meeting. The employer did not give her a chance to demonstrate compliance, but instead quickly moved to discharge her from the employment. The final factors that appear to have been the deciding factors were the recent arrival of Mr. O'Kelly, the changes he planned to implement, and his pronouncement that he was not going to allow Ms. Noll to "buck" him. Ms. Noll had no doubt seen several Store Directors come and go during her lengthy tenure. A

reasonable person would expect the employer to give her an opportunity to demonstrate compliance with the new Store Director's rules or approach. Mr. O'Kelly elected not to wait to see whether a pattern of conduct emerged and instead moved swiftly to discharge Ms. Noll from the employment.

While the evidence does establish some deviations from written policy on May 14, the evidence does not establish a pattern of refusing to comply with reasonable directives. Nor does the evidence establish a willful or wanton disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Noll was discharged for no disqualifying reason. Accordingly, Ms. Noll is eligible for benefits provided she is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's June 21, 2012, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs