

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANGELA M SIMPSON
Claimant

APPEAL NO. 17A-UI-07601-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAMILY DOLLAR STORES OF IOWA INC
Employer

OC: 06/25/17
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 19, 2017, reference 04, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that the claimant was discharged on June 20, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on August 14, 2017. Claimant Angela Simpson did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Emily Pettit, Store Manager, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 7 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

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

Whether the claimant was overpaid unemployment insurance benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Angela Simpson was employed by Family Dollar Stores of Iowa, Inc. as a part-time assistant manager from November 2016 until June 20, 2017, when Emily Pettit, Store Manager, discharged her from the employment. Ms. Pettit was Ms. Simpson's immediate supervisor. Ms. Simpson

worked at the employer's store located on Mount Vernon Road in Cedar Rapids. Ms. Simpson was responsible for all store operations in the absence Ms. Pettit.

The final conduct that triggered the discharge occurred on June 15, 17 and 18, 2017. That conduct concerned Ms. Simpson's failure to adhere to the employer's dress code and her failure to follow a directive issued by the District Manager, Jesse Kelsey. The dress code is contained the Team Member Handbook that the employer provided to Ms. Simpson at the start of her employment. The dress code states, in relevant part, as follows:

Team Members of Family Dollar are expected to present a clean and professional appearance while conducting business, in or outside of the property. Dressing in a fashion that is unprofessional, that is deemed unsafe, or that negatively affects Family Dollar's reputation or image is not acceptable. All Team Members are expected to maintain their work attire.

The employer requires that employees wear a red polo shirt and khaki slacks. The employer posts notice of this requirement in the store. While the employer's written policy and store posting does not specify acceptable footwear the nature of the work necessitates closed-toe footwear to avoid injury. Ms. Simpson would have to move merchandise in the store using a cart and would have to assist with unloading freight from trucks. Wearing open-toed footwear increased the risk of Ms. Simpson suffering injury to her feet in the course of performing her regular duties. On May 9, 2017, Ms. Simpson had on one occasion worn casual sandals, flip flops, to work. At the time, Ms. Simpson had recently experienced a fire at her apartment and did not have access to other footwear. At the time, Ms. Pettit told Ms. Simpson that the flip flops were okay for that day because it was not a truck freight day, but that Ms. Simpson should not thereafter wear sandals to work for safety reasons. On June 15, 2017, the District Manager, Jesse Kelsey, stopped by the store and observed Ms. Simpson to be wearing flip flops. Mr. Kelsey told Ms. Simpson to thereafter refrain from wearing flip flops to work. On about June 20, 2017, Ms. Pettit reviewed store surveillance from June 17 and 18 as part of her regular duties as store manager. Ms. Pettit observed that Ms. Simpson had worn flip flops to work on both June 17 and 18 despite Mr. Kelsey's directive. When Ms. Pettit spoke to Ms. Simpson, Ms. Simpson stated that she had worn flip flops to work because it was hot in the store.

On December 27, 2016, Ms. Pettit had issued a written reprimand to Ms. Simpson after Ms. Simpson failed on December 24, 2017 to post sale information in the store as directed. Ms. Pettit had directed Ms. Simpson to post the sale information. Ms. Simpson had an entire shift in which to post the sale signage on the shelves containing the sale merchandise. Ms. Simpson had a cashier at the store that day and had time in which to complete the assigned work. When Ms. Pettit spoke with Ms. Simpson about the failure to post the sale information in the store, Ms. Simpson stated that she had not felt like doing the work.

The employer also considered other conduct when making the decision to discharge Ms. Simpson from the employment. On December 7, 2016, Ms. Pettit issued a reprimand to Ms. Simpson for unacceptable point-of-sale transactions. Ms. Pettit cannot recall the parties of the incident that triggered the reprimand. On January 2, 2017, Ms. Simpson's drawer was short between \$14.00 and \$15.00. The employer was not able to determine the basis of the shortage, but did not suspect foul play on the part of Ms. Simpson. On March 19, 2017, Ms. Simpson was responsible for closing the store. Those duties included securing cash register drawers containing the petty cash for the next day's start of business in the safe and activating the security system before Ms. Simpson left the workplace. Ms. Simpson left the cash drawers with the petty cash for the next day's business in the cash register drawers and

failed to activate the security system before she left. On March 22, 2017, Ms. Pettit issued a final warning to Ms. Simpson in lieu of discharging her from the employment.

Ms. Simpson established an original claim for unemployment insurance benefits that was effective June 25, 2017. Ms. Simpson received \$804.00 in benefits for the six-week period between June 25, 2017 and August 5, 2017. Family Dollar is one of Ms. Simpson's base period employers.

On July 18, 2017, an Iowa Workforce Development claims deputy held a fact-finding interview to address Ms. Simpson's separation from Family Dollar. Ms. Pettit represented the employer at the fact-finding interview and provided an oral statement. The employer also submitted for the fact-finding interview copies of the written reprimands, policy, and acknowledgment materials that were later resubmitted as Exhibits 1 through 7 for the appeal hearing.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 in the record establishes misconduct in connection with the employment based on insubordination. In May 2017, Ms. Pettit had allowed an exception to the dress code due to Ms. Simpson’s extenuating circumstances, but directed Ms. Simpson to thereafter refrain from wearing flip flops to work. Despite that directive, Ms. Pettit again work flip flops to work on June 15, 2017. On that day, Mr. Kelsey directed Ms. Simpson to refrain from wearing flip flops to work. Despite both directives, Ms. Simpson elected to wear flip flops to work on June 17 and 18. The employer’s safety-based directives that Ms. Simpson refrain from wearing flip flops to work was reasonable. A reasonable person would also conclude that flip flops are per se unprofessional and inappropriate attire for a retail manager to wear when performing store duties that included interacting with customers. Ms. Simpson did not have a reasonable basis for failing to adhere to the dress code on June 15, 17 or 18, 2017. In addition to these events, Ms. Simpson had unreasonably failed in December 2017 to comply with Ms. Pettit’s reasonable directive that she post the sale signage. The evidence presents a pattern of insubordination.

In addition, each of the instances of insubordination can be viewed as negligence. Ms. Simpson displayed substantial negligence in March 2017, when she failed to secure the petty cash and failed to activate the security system prior to leave the work place at the close of business. The evidence in the record is sufficient to establish a pattern of negligence.

The pattern of conduct that factored in the discharge was sufficient to establish intentional and substantial 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. Simpson was discharged for misconduct in connection with the employment. Accordingly, Ms. Simpson is

disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Simpson must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Ms. Simpson received benefits but has been denied benefits as a result of this decision. Ms. Simpson was overpaid \$804.00 in benefits for the six-week period between June 25, 2017 and August 5, 2017. Because the employer participated in the fact-finding interview, Ms. Simpson must repay the benefits. The employer's account is relieved of liability for benefits, including liability for benefits already paid to Ms. Simpson.

DECISION:

The July 19, 2017, reference 04, decision is reversed. The claimant was discharged on June 20, 2017 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant was overpaid \$804.00 in benefits for the six-week period between June 25, 2017 and August 5, 2017. The claimant must repay the benefits. The employer's account is relieved of liability for benefits, including liability for benefits already paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs