

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHERYL WEEKS

Claimant

APPEAL NO. 11A-UI-05763-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC

Employer

OC: 03/27/11

Claimant: Respondent (1)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 20, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 24, 2011. Claimant Cheryl Weeks participated. Paula Mack of Corporate Cost Control represented the employer and presented testimony through Andrew Hoverson, Angie Jenson, and Jim Raes. Exhibits Two through Nine 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: Cheryl Weeks was employed by Hy-Vee as a full-time cashier from 1997 until March 24, 2011, when Assistant Store Director Jim Raes and Store Director Jennifer Book discharged her from the employment.

The final two incidents that triggered the discharge occurred on March 22 and 23, 2011. On March 22, Ms. Weeks appeared for her 7:00 a.m. shift. At 7:05 a.m., Assistant Manager Andrew Hoverson observed Ms. Weeks behaving strangely at her cash register. Ms. Weeks repeatedly grabbed her head and repeatedly stated that the whole world was spinning. Ms. Weeks cried uncontrollably in front of customers. Ms. Weeks walked around her register. Ms. Weeks put her face in her hands. Mr. Hoverson removed Ms. Weeks from her register and had Ms. Weeks go to the customer service area. While Ms. Weeks was sitting in the customer service area, she continued to say that the world was spinning. Ms. Weeks' speech was slurred. Mr. Hoverson did not note any smell of alcohol or blood shot eyes. Ms. Weeks asked Mr. Hoverson to find a replacement for her so that she could go home. Mr. Hoverson found a replacement and Ms. Weeks departed.

During her shift on March 23, Ms. Weeks engaged in similar, but less pronounced erratic behavior. Ms. Weeks cried uncontrollably and said she did not feel well. Mr. Hoverson ultimately decided to send Ms. Weeks home due to her emotional state.

On March 22 and 23, Ms. Weeks did not mention anything about a toothache or having taken medication. Mr. Hoverson did not inquire about why Ms. Weeks was behaving the way she was.

In making the decision to discharge Ms. Weeks from the employment, the employer considered prior matters, the most recent of which were Ms. Weeks' absences due to illness properly reported to the employer on November 2 and 12, 2010, as well as January 2 and March 3, 4, and 16, 2011.

The employer has a written drug and alcohol free workplace policy, but did not invoke it on March 22 or 23 and did not request that Ms. Weeks submit to a drug test.

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).

The weight of the evidence establishes that Ms. Weeks did indeed behave erratically at work on March 22 and 23 and went home early on both days. The weight of the evidence indicates that Ms. Weeks’ behavior was being affected by something, but it is unclear what that something was. The employer had a drug testing policy, but did not use it. While the administrative law judge finds Ms. Weeks’ explanation of the incidents convenient but implausible, the burden was on the employer to establish misconduct in connection with the final two incidents that triggered the discharge. The employer had a drug testing policy, but failed to use it. The employer had presented insufficient evidence to establish misconduct in connection with the incidents on March 22 and 23. The evidence indicates a series of absences due to illness properly reported to the employer. Each absence would be an excused absence under the applicable law and cannot serve as the basis for a finding of misconduct. Because the evidence fails to establish any current of misconduct, the administrative law judge concludes that Ms. Weeks was discharged for no disqualifying reason. Accordingly, Ms. Weeks is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged for benefits paid to Ms. Weeks.

DECISION:

The Agency representative’s April 20, 2011, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw