

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ERICA N MANN
Claimant

APPEAL NO. 11A-UI-15993-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAMILY DOLLAR STORES OF IOWA INC
Employer

**OC: 10/09/11
Claimant: Respondent (2-R)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 9, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 17, 2011. Claimant Erica Mann participated. Frank Sposeto represented the employer and presented additional testimony through Amanda Juarez. Exhibit One was 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: Erica Mann was employed by Family Dollar as a part-time cashier until October 8, 2011, when Store Manager Amanda Juarez and District Manager Frank Sposeto discharged her from the employment. Ms. Juarez was Ms. Mann's immediate supervisor.

The incident that triggered the discharge occurred on October 4, 2011. While dealing with a very difficult customer, Ms. Mann reached over and swatted the customer's shoulder. This occurred after Ms. Mann had been dealing with the difficult and irrational customer at her checkout lane for several minutes. Ms. Mann's intent was to get the customer to cooperate with completing the transaction, which the customer had held up for several minutes. The customer was a regular at the store where Ms. Mann worked. Ms. Mann's physical contact with the customer provoked the customer's upset response. The customer demanded an apology. Ms. Mann refused the customer's request. Ms. Juarez directed Ms. Mann to apologize and Ms. Mann initially continued her refusal. Ms. Mann said she did not mean anything by the action and did not feel the need to apologize. When Ms. Mann eventually apologized to the customer, her demeanor indicated the apology was not genuine. The customer said she was not going to shop at the store if that was how the store treated its customers. The customer insisted on having the store refund her entire purchase. The customer then left the store and summoned the police. The police came and interviewed Ms. Mann and the customer.

The employer has a written zero-tolerance violence in the workplace policy. Ms. Mann was aware of the policy. The policy indicated that the company's goal was to "provide a workplace that is safe and free of undue tensions." The policy indicated that it was a zero-tolerance policy. The policy prohibited violent, threatening, or intimidating actions by anyone at any time on company property. Ms. Mann was aware of the policy.

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).

Ms. Mann's contact with the customer is problematic because the reasons she provides for the conduct do not fit with her actions immediately after she made contact with the customer. One can understand why Ms. Mann might be frustrated with the customer under the circumstances. The evidence indicates that Ms. Mann was indeed frustrated, if not also angry, with the customer. Ms. Mann hit the customer to force compliance with her goal of completing the transaction. Ms. Mann's statement that she was touching the customer in a friendly, cajoling manner does not fit with her subsequent refusal to apologize to the customer when the unwelcome contact unsurprisingly upset the customer. Ms. Mann's intentional contact with the customer was inappropriate, violated the employer's zero tolerance policy, and was in willful disregard of the employer's interests in maintaining a safe and civil workplace and in maintaining goodwill established with customers.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Mann was discharged for misconduct. Accordingly, Ms. Mann 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 Ms. Mann.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's December 9, 2011, reference 01, decision is reversed. The claimant was discharged for misconduct. 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 allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css