

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EDWARD R SANKS

Claimant

APPEAL NO. 09A-UI-00951-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

CASEY'S GENERAL STORES

Employer

**OC: 12/21/08 R: 03
Claimant: Appellant (2)**

Iowa Code Section 96.5(2) – Discharge for Misconduct

STATEMENT OF THE CASE:

Edward Sanks filed a timely appeal from the January 14, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 6, 2009. Mr. Sanks participated. The employer did not provide a telephone number in response to the hearing notice directions and did not participate. Exhibit A was received into evidence.

The employer received proper notice of the hearing. On February 5, 2009, TALX UC eXpress Unemployment Insurance Consultant Lori Ceselski faxed a written request to postpone the February 6, 2009 hearing. Ms. Ceselski stated that, "The witness, Blake Homewood will not be available to participate due to being out of town." Ms. Ceselski provided no more information to support the request for postponement. The employer did not indicate the witness's relationship to the case, why he would be out of town, when the employer or employer representative learned that he would be out of town, or why the employer representative had waited until the day before the hearing to request the postponement. Within an hour of submission of the faxed request, the administrative law judge telephoned the employer representative. The employer representative did not answer, but the administrative law judge was routed to Ms. Ceselski's voice mailbox. The administrative law judge notified the employer representative that, in light of the untimely request and absent more information to establish good cause to move the hearing, the request to postpone the hearing was denied. The administrative law judge invited the employer representative to contact the administrative law judge with more information to support the request to postpone the hearing, but did not hear back from the employer representative.

ISSUE:

Whether the claimant voluntarily quit or was discharged. The administrative law judge concludes that the claimant was discharged from the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Edward Sanks started his employment with Casey's General Stores in August 2007 and last performed work for the employer on or about December 18, 2008. Mr. Sanks started the employment as a

part-time cashier, but became a full-time cashier in August 2008. Mr. Sanks' immediate supervisor was Lindsey Lerch, Store Manager. On December 8, 2008, Ms. Lerch reprimanded Mr. Sanks because his cash register drawer had been \$20.67 short on December 7, 2008. Ms. Lerch suspended Mr. Sanks without pay until December 13, 2008. During the period of suspension, representatives of the Marion Police Department went to Mr. Sanks's home as part of an law enforcement investigation into theft of lottery tickets from the store where Mr. Sanks worked. During the contact with the police, the police representatives told Mr. Sanks that he was not allowed to go back onto the employer's property. This ended Mr. Sanks's employment.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993).

Because the employer failed to participate in the hearing or provide good cause to reschedule the hearing, the evidence in the record is limited to the testimony of Mr. Sanks and Exhibit A. Based on the evidence in the record, the administrative law judge concludes that Mr. Sanks reasonably concluded he was discharged from the employment when the police representatives told him he could not go back on the employer's property. The evidence in the record fails to establish a voluntary quit.

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 a discharge 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 employer has failed to present any evidence to substantiate or corroborate an allegation of misconduct. The employer had the ability to present evidence. The single reprimand for a \$20.67 cash drawer shortage is insufficient evidence to establish misconduct in connection with the employment that would disqualify Mr. Sanks for unemployment insurance benefits.

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

Iowa Code section 96.5-2-b-c 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:

b. Provided further, If gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

The administrative law judge notes that the employer may pursue further remedy under a theory of gross misconduct, provided the employer satisfies the requirements of the above referenced statute.

DECISION:

The Agency representative's January 14, 2009, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs