

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

KATHERINE M DONATH
Claimant

APPEAL NO. 18A-UI-06910-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAREWAY STORES INC
Employer

OC: 06/03/18
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 22, 2018, reference 01, 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 Benefits Bureau deputy's conclusion that the claimant was discharged on June 5, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on July 13, 2018. Claimant Katherine Donath participated. Theresa McLaughlin represented the employer and presented additional testimony through Paul Schemmel. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which record reflects that no benefits have been disbursed to the claimant in connection with the June 3, 2018 original claim. Exhibits 1 through 7 were received into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance 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: Katherine Donath was employed by Fareway Stores, Inc. as a full-time bakery clerk at the employer's Dubuque store until June 5, 2018, when Paul Schemmel, Store Manager, discharged her from the employment. Ms. Donath had started with Fareway in 2011 as a bakery clerk at the Dubuque store. From mid-2015 to May 2016, Ms. Donath served as bakery manager at the Dubuque store. Ms. Donath then returned to a bakery clerk position and continued in that position to the end of her employment. During the last month or two of Ms. Donath's employment, Cassidy Pucchio was Kitchen Manager and Ms. Donath's immediate supervisor. Ms. Pucchio reports to Mr. Schemmel.

The conduct that triggered Mr. Schemmel's decision to discharge Ms. Donath from the employment concerned the method Ms. Donath used to make buns for foot-long hotdogs. From the start of Ms. Donath's employment until March or April 2018, the Dubuque Fareway bakery's established method of making buns for foot-long hotdogs involved taking the prepared dough

used for a regular hotdog and stretching it to fit a foot-long hotdog. In March or April 2018, the Dubuque Fareway bakery altered its approach to making foot-long hotdog buns to match the approach taken by the Cedar Rapids Fareway bakery. Under this new approach, the bakery clerks would fuse together two pieces of prepared regular-length hotdog bun dough to make a foot-long hotdog bun. The new approach became the established method of making foot-long hotdog buns. This new approach did not sit well with Ms. Donath because fusing the two pieces of dough left an obvious bump in the foot-long bun where the two pieces of regular hotdog bun dough were fused together.

On May 25, 2018, Ms. Donath decided to make a small quantity of foot-long hotdog buns the old way and to make the rest the new way for the sake of comparing the two. Ms. Donath did not ask permission prior to conducting the comparison experiment. When Mr. Schemmel learned of the experiment, he met with Ms. Donath on May 26, 2018, issued a written reprimand, and directed her to make the foot-long hotdog buns pursuant to the two-bun fusing method learned from the Cedar Rapids store.

On May 31, 2018, Ms. Donath looked in the Fareway Product Listing book and saw that one accepted method of making buns for foot-long hotdogs involved stretching prepared brat/steak bun dough to fit a foot-long hotdog. On May 31, 2018, Ms. Donath made one package of foot-long hotdog buns with this alternate technique and presented the product to Ms. Pucchio, to the meat manager, and to another manager. Those managers agreed that the foot-long buns made by stretching the brat/steak bun dough looked better than the foot-long buns made by fusing two pieces of regular hotdog bun dough.

When Ms. Donath got to work on Monday, June 4, 2018, she learned that the person who was supposed to set out hotdog bun dough on Saturday, June 2 for use in making buns on Monday, June 4 had not set out the hotdog bun dough. Ms. Donath asked Ms. Pucchio for permission to make the foot-long hotdog buns with the brat/steak dough and Ms. Pucchio gave her approval. When Mr. Schemmel saw the foot-long hotdog buns on the store shelf, he took them off the shelf and threw them in the garbage. Mr. Schemmel told Ms. Donath that he was the boss of the store, that she should not have made the buns that way, and that it did not matter what other managers said. On June 4, Mr. Schemmel issued a written reprimand to Ms. Donath and suspended her for three days. On the next day, Mr. Schemmel discharged Ms. Donath from the employment for failure to follow the directive he had reinforced at the time of the May 26 reprimand.

Mr. Schemmel identifies earlier concerns and reprimands as additional factors in the decision to discharge Ms. Donath from the employment. In February 2018, Mr. Schemmel used a five-gallon bucket instead of a step-stool to reach an item on a high shelf in the bakery. Using the bucket instead of a step-stool violated Fareway's safety protocol. A step-stool was available. Ms. Donath was aware that the safety protocol prohibited her to using the bucket in lieu of the step-stool. In November 2017, the employer issued reprimands to Ms. Donath for alleged poor attitude and for allegedly uttering disrespectful, negative remarks about coworkers in the bakery. Ms. Donath had commented that no one had prepared buns for the day, that two bakery employees were gone, that she did not know where they were, and that the bakery was falling behind on its daily work.

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).

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 weight of the evidence in the record fails to establish misconduct in connection with the employment. The weight of the evidence indicates that there were extenuating circumstances on June 4, 2018, when Ms. Donath's made the foot-long hotdog buns with brat/steak bun dough instead of fusing two pieces of regular hotdog bun dough together. In addition, the weight of the evidence establishes that on June 4, 2018, Ms. Donath acted with the approval of her immediate supervisor. The weight of the evidence fails to establish insubordination in connection with the June 4 incident that triggered the discharge. Under the circumstances, Ms. Donath's June 4 conduct was reasonable and did not constitute an unreasonable refusal to follow the employer's directive. Under the circumstances, the employer's heavy-handed enforcement of the foot-long bun making method on June 4, 2018 was unreasonable. The evidence also fails to establish unreasonable refusal to follow reasonable instructions on or about May 25, 2018, when Ms. Donath experimented with the two approaches to making the foot-long hotdog buns. The weight of the evidence establishes that Ms. Donath was at all relevant times concerning the bun making matter interested in best serving the interests of Fareway Stores, Inc. Pleasing Mr. Schemmel was not necessarily synonymous with serving the best interests of the employer, Fareway Stores, Inc. Because the evidence fails to establish misconduct in connection with the bun making issues, the evidence fails to establish a current act of misconduct. Accordingly, the administrative law judge need not further consider the alleged conduct from November 2017 or the safety violation from February 2018.

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

DECISION:

The June 22, 2018, reference 01, decision is affirmed. The claimant was discharged on June 5, 2018 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/rvs