

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

PENNY L REESE
Claimant

APPEAL NO. 18A-UI-10228-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KUM & GO LC
Employer

OC: 09/02/18
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 October 1, 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 deputy's conclusion that the claimant was discharged on August 30, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on October 26, 2018. Claimant Penny Reese participated. Teresa Phillips represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibit 1 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 employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Penny Reese was employed by Kum & Go, L.C. as a full-time Food Service Associate at the employer's Waukee convenience store from January 2018 until August 30, 2018, when Teresa Phillips, Store Manager, discharged her from the employment. Ms. Phillips began her employment with Kum & Go in April 2018. Ms. Phillips began working at the Waukee location and became Store Manager at that location on August 13, 2018. Prior to Ms. Phillips' start at the Waukee store, Ms. Reese performed her work duties without incident and received no reprimands.

On August 22, 2018, Ms. Phillips issued a written reprimand to Ms. Reese that was based on events that transpired on August 15, 17 and 20. Ms. Phillips alleged that Ms. Reese had ignored a customer on August 15. Ms. Reese had been performing other duties and had not ignored the customer. When the customer approached the counter, Ms. Reese served the customer. On August 17, Ms. Reese had declined to sell all of the sliced pizza to a single patron who wanted to purchase all of the sliced pizza on display. Selling all of the pre-sliced pizza to one customer would make pre-sliced pizza unavailable to other patrons until more pizza could be made. Ms. Reese acted in good faith and pursuant to prior instructions she had received from a supervisor. Pursuant to those earlier instructions, Ms. Reese was supposed to refuse to sell all of the pre-sliced breakfast pizza to the single customer and instead make a whole breakfast pizza for the customer.

The employer's decision to discharge Ms. Reese on August 30, 2018 was triggered by three events on August 29 and two more events on August 30. Ms. Phillips alleges that Ms. Reese failed to appropriate a customer in three instances on August 29. In the first instance, Ms. Reese had directed a customer to use the ordering kiosk to order a sandwich pursuant to established protocol. In the other two instances, Ms. Reese had been performing other work tasks and did not immediately see and greet the customers while engaged in other required duties. The employer alleges that Ms. Reese failed to greet a customer at 5:15 a.m. on August 30. Ms. Reese had previously been instructed the kitchen area of the convenience store was not to open until 6:00 a.m. Finally, the employer faults Ms. Reese for not returning to a waiting customer after agreeing to change a soda tank to let the customer know that the tank was in the process of being changed. Ms. Reese had responded to the customer's request in a timely manner and had promptly sought assistance with changing the tank. When Ms. Reese returned to her work area, she was under the belief that the customer had already departed from the store.

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 establishes that Ms. Reese performed her work duties in good faith, to the best of her ability, and consistent with prior instructions, but could not satisfy the expectations of her new supervisor. Ms. Reese's inability to perform to the satisfaction of the new supervisor did not constitute misconduct in connection with the employment and would not disqualify Ms. Reese for unemployment insurance benefits. Ms. Reese is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The October 1, 2018, reference 01, decision is affirmed. The claimant was discharged on August 30, 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