

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TRACI A KEIL
Claimant

APPEAL NO. 08A-UI-04332-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EASTERN IOWA TJ LC
TACO JOHN
Employer

OC: 03/23/08 R: 04
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Eastern Iowa TJ, L.C., doing business as Taco John's, filed a timely appeal from the May 1, 2008, reference 07, decision that allowed benefits. After due notice was issued, a hearing was held on May 20, 2008. Claimant Traci Keil participated. Camdon Boussetot, General Manager, represented the employer and presented additional testimony through Eric Schryver, Partner. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Traci Keil was employed by Taco John's as a part-time manager-in-training from March 13, 2008 until March 24, 2008, when General Manager Camdon Boussetot discharged her from the employment. Ms. Keil had only worked three shifts for the employer before Mr. Boussetot concluded she would not work out as a manager or as an employee. The final incident that prompted the discharge occurred on March 21, when Mr. Boussetot instructed Ms. Keil to clean the floor under the fryer. Ms. Keil refused to do so because she thought it was not part of her job duties as a manager-in-training. The restaurant was not very busy at the time and all employees were engaged in cleaning the restaurant. Mr. Boussetot had discussed cleaning duties at Ms. Keil's interview and had indicated that all employees had an obligation to keep the restaurant clean. During the brief employment, Mr. Boussetot had observed Ms. Keil being rude to other employees. Mr. Boussetot believed that Ms. Keil had inflated her prior restaurant experience in her application and/or at her interview.

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).

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).

In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

The weight of the evidence indicates that the employer discharged Ms. Keil because she simply was not a good fit. The weight of the evidence does establish that Ms. Keil refused to clean under a fryer when instructed to do so. The employer's directive was not unreasonable. Ms. Keil's refusal was unreasonable. However, the employment was so brief that there was hardly an opportunity for Ms. Keil to engage in repeated refusal to follow her supervisor's directives.

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

DECISION:

The Agency representative's May 1, 2008, reference 07, 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/css