

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAWN M CELLAN
Claimant

APPEAL NO. 09A-UI-15668-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DOLGENCORP LLC
DOLLAR GENERAL
Employer

OC: 09/20/09
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 8, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 19, 2009. The claimant participated. Thomas Johnson, Store Manager, represented the employer and presented additional testimony through Assistant Manager Brenda Taylor. Exhibits One through Seven were received into evidence.

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: Dawn Cellan was employed by Dollar General on a full-time basis from June 2008 until September 18, 2009, when Store Manager Thomas Johnson discharged her from the employment. Mr. Johnson started with Dollar General on August 12, 2009, completed manager training by the end of August and then commenced his duties as manager of the Ingersoll Avenue store in Des Moines. Ms. Cellan had started her employment as a cashier at the employer's Pleasant Hill store, was promoted to Third Key, and was transferred to the Ingersoll store in June 2009. Ms. Cellan was Third Key at the Ingersoll store until she was discharged from the employment.

Ms. Cellan suffers from emotional intensity disorder. Ms. Cellan takes three psychotropic medications to address anxiety and depression. Ms. Cellan's mental health issues factored heavily in her relationships with other employees and with her superiors at Dollar General. Before the transfer from the Pleasant Hill store to the Ingersoll store, Ms. Cellan alleged that an assistant manager at the Pleasant Hill store was harassing her. The employer investigated and determined that Ms. Cellan and another employee were engaging in inappropriate conduct directed at the assistant manager. The employer transferred Ms. Cellan to the Ingersoll store to separate Ms. Cellan from the assistant manager. Mr. Hutchison and Mr. Johnson's predecessor at the Ingersoll store were aware of Ms. Cellan's mental health issues. Mr. Johnson was not.

Nor was Mr. Johnson aware of any accommodations the employer had previously extended to Ms. Cellan to make it possible for her to continue in the employment.

The final incident that triggered the discharge occurred on September 18, 2009. On that day, Mr. Johnson summoned Ms. Cellan to work early so that she could cover the store while he reworked an employee schedule. The Ingersoll store needed to send employees to help cover shifts at the employer's store on 63rd Street. Mr. Johnson had asked Ms. Cellan to work for a week at the 63rd Street store and had Ms. Cellan agreed. One shift conflicted with an emotional therapy class Ms. Cellan attended on Wednesdays. Ms. Cellan initially indicated she would work the shift, but later changed her mind. On September 18, when Ms. Cellan tried to speak with Mr. Johnson about her scheduling concerns, Mr. Johnson continued with his back to Ms. Cellan. Mr. Johnson told Ms. Cellan that he had made his decision and that he did not intend to further discuss the matter with Ms. Cellan.

Thereafter, the discussion rapidly spiraled out of control. Ms. Cellan turned the discussion to Mr. Johnson's decision to hire someone from outside the company to fill an open assistant manager position. Ms. Cellan said it was not fair that she had been bypassed for the position. Ms. Cellan broke down in tears. Ms. Cellan asserted that she had transferred to the Ingersoll store with the hope of obtaining the assistant manager position. Mr. Johnson reminded Ms. Cellan that she had had no choice in the transfer. Mr. Johnson told Ms. Cellan that the person he chose for the assistant manager position was better qualified. Mr. Johnson added that he did not think Ms. Cellan was ready for the assistant manager position because she was too emotional and lacked the requisite ability. Mr. Cellan moved on to complain that Mr. Johnson was changing things at the Ingersoll that he should not change. Mr. Johnson terminated the discussion and left the area. Ms. Cellan sat down and continued to cry. Ms. Cellan's counselor had told her to take a break to collect herself if her work situation became overwhelming. Mr. Hutchins and the Pleasant Hill store manager had been okay with such breaks, provided Ms. Cellan kept them short.

Mr. Johnson called the district manager, Mike Hutchison, who suggested getting someone else to cover the remainder of Ms. Cellan's shift. When Mr. Johnson told Ms. Cellan he was sending her home for the evening, Ms. Cellan responded by raising her voice. Mr. Johnson explained that he was just sending Ms. Cellan home for the night. Ms. Cellan continued to challenge Mr. Johnson's decision. Mr. Johnson told Ms. Cellan to stop asking questions and comply with his directive or he would discharge her from the employment. Mr. Hutchison had told Mr. Johnson that if Ms. Cellan's conduct continued, Mr. Johnson should discharge Ms. Cellan from the employment. When Ms. Cellan continued to question Mr. Johnson's decision to send her home, Mr. Johnson told Ms. Cellan he was discharging her from the employment.

Mr. Cellan regularly challenged Mr. Johnson's exercise of his authority as store manager. The employer had previously decided to change the color of the shirts employees were required to wear and to make the change effective no later than February 2010. Mr. Johnson notified the staff on August 12 that he was going to make the change to the new shirts ahead of schedule on October 1, 2009. Ms. Cellan was upset by Mr. Johnson's decision because she lacked funds to purchase new shirts. Ms. Cellan told Mr. Johnson on a regular basis that he had no right to move up the change in uniform. Mr. Johnson located a store where employees could purchase the shirts at a reasonably low price. Ms. Cellan reported back that her size was not being sold at that low price. Ms. Cellan thought Mr. Johnson was being insensitive to her financial situation.

On September 1, Ms. Cellan balked when Mr. Johnson directed her to stop performing on-hand inventory count duties that were part of his duties as a manager and to focus instead on making

the store more presentable by “facing” the store shelves. Mr. Johnson had to tell Ms. Cellan twice to stop performing his assigned duties before she complied. The prior manager had asked Ms. Cellan to perform the on-hand inventory count on one occasion, but Ms. Cellan knew the duties were not part of hers to perform more than that one time.

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).

The weight of the evidence in the record indicates that Mr. Johnson and Ms. Cellan each contributed to the out-of-control situation that arose on September 18, 2009. The weight of the evidence indicates that Ms. Cellan's mental health diagnosis factored heavily in her conduct. Though it was a mitigating factor, it was not a complete excuse for her inappropriate conduct. The weight of the evidence suggests that Mr. Johnson might have approached the September 18 incident or prior concerns differently if he had been aware of Ms. Cellan's mental health diagnosis and of the informal accommodations the employer had previously extended to Ms. Cellan. Both parties to the September 18 incident had reasonable issues to take up with the other. Neither party conducted itself in a wholly reasonable manner. The weight of the evidence fails to establish that Ms. Cellan employed profanity. The employer was unable to ascribe specific profane comments to Ms. Cellan.

Though the decision to discharge Ms. Cellan was within the discretion of the employer, the evidence in the record fails to establish insubordination within the meaning of the law. Though Ms. Cellan's conduct was inappropriate, it did not rise to the level of misconduct that would disqualify her for unemployment insurance benefits. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Cellan was discharged for no disqualifying reason. Accordingly, Ms. Cellan is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Cellan.

DECISION:

The Agency representative's October 8, 2009, reference 01, 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