

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISHA M EDWARDS
Claimant

APPEAL NO. 12A-UI-13678-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 10/14/12
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 2, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 13, 2012. Claimant Chrisha Edwards participated. Alice Rose Thatch of Corporate Cost Control represented the employer and presented testimony through Amy Day, Manager of Perishables, Les Bruner, Human Resources Manager, and Darin Schoop, Manager of Store Operations. Exhibits One through Five were received into evidence.

ISSUE:

Whether Ms. Edwards was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits. The administrative law judge concludes that Ms. Edwards was discharged for insubordination that constituted misconduct and is disqualified for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Chrisha Edwards was employed by Hy-Vee as a clerk in the Chinese Express area from 2007 until October 16, 2012, when Amy Day, Manager of Perishables, discharged her from the employment. Ms. Edwards' duties included serving customers, stocking supplies, cleaning, and cooking as needed. Ms. Edwards had started as a part-time employee, but had been promoted to full-time employment in 2010. Nelson Ho, Chinese Express Manager, was Ms. Edwards' immediate supervisor. The employer's upper management for the store included Ms. Day, Les Bruner, Human Resources Manager, Darin Schoop, Manager of Store Operations, and Kim Cole, Store Director.

The final incident that triggered the discharge occurred on October 16, 2012. On that day, Ms. Edwards overheard Ms. Day speaking to Mr. Ho about having found an employee to assist the Chinese Express the following Tuesday. Ms. Edwards was scheduled to work the following Tuesday from 9:30 a.m. to 7:00 or 7:30 p.m. Ms. Edwards expected that day to be a busy day. Ms. Edwards was concerned about who she would be working with and asked Ms. Day who would be assisting. Ms. Day told Ms. Edwards that it would be Mitch Hopson. Ms. Edwards did

not know who Mr. Hopson was and asked Ms. Day who he was. Ms. Day told Ms. Edwards that Mr. Hopson had assisted in the Chinese Express once before. Ms. Edwards asked Ms. Day whether Ms. Day could find someone else to cover the Chinese Express shift on the busiest day of the week. Ms. Day said no, that she could not find someone else to work the shift, and that Mitch would be working. Ms. Edwards then asked whether someone from the bakery who had experience working in the Chinese Express could cover the shift. Ms. Day said no. Ms. Edwards then asked whether someone else in the Chinese Express area could switch days to cover the shift. As Ms. Day walked away, she said the matter was for her to worry about. Ms. Edwards responded that she would have to worry about it as well.

After Ms. Edwards and Ms. Day finished their conversation, Ms. Edwards proceeded to talk to other employees in the area about her disagreement with Ms. Day's staffing decision. Ms. Edwards told Mr. Ho, her immediate supervisor, about the conversation with Ms. Day, that she had never worked with Mitch, and that she was not going to be stuck with Mitch. Ms. Edwards then spoke to another store employee, Angie, who had overheard the conversation between Ms. Edwards and Ms. Day. Ms. Edwards told Angie that she had asked Ms. Day for help and that Ms. Day did not like it. Ms. Edwards then spoke to two other employees about the same matter. Darin Schoop, Manager of Store Operations, observed and overheard some of Ms. Edwards' conversations with coworkers about her disagreement with Ms. Day's staffing decision.

A short while later, the employer summoned Ms. Edwards to a meeting with Ms. Day, Mr. Schoop, and Les Bruner, Human Resources Manager. Ms. Day spoke on behalf of the employer and told Ms. Edwards that she was being discharged for insubordination.

In making the decision to discharge Ms. Edwards from the employment, the employer considered a matter from September in which Ms. Edwards repeatedly refused to follow a directive issued by Mr. Bruner regarding Ms. Edwards' new nose piercing. Ms. Edwards knew before she got the piercing that the employer's written dress code prohibited her from wearing the nose piercing at work. Ms. Edwards knew that the employer's written dress code required that she was only allowed to wear a clear plastic plug in place of the nose ring while at work. On September 13, Mr. Bruner encountered Ms. Edwards while she was working in the Chinese Express. Mr. Bruner reminded Ms. Edwards of the dress code policy concerning facial piercings. Ms. Edwards said she was aware of the policy, but intended to cover the piercing with a bandage. Mr. Bruner told Ms. Edwards that was not acceptable and told her that she would either need to remove the piercing or replace it with a clear plug. Ms. Edwards told Mr. Bruner that she would take the matter up with Kim Cole, Store Director. Ms. Cole had been away from the store a few days and was expected to be away longer. Mr. Bruner told Ms. Edwards that it was okay that she intended to take the matter up with Ms. Cole, but that in the mean time she would have to follow his instructions.

Ms. Edwards did not follow the Human Resources Manager's instructions. On September 18, Mr. Bruner went to the Chinese Express to purchase his lunch and observed Ms. Edwards wearing a bandage over her piercing. Mr. Bruner told Ms. Edwards that the bandage was not acceptable. Ms. Edwards again told Mr. Bruner that she would take the matter up with Ms. Cole. Mr. Bruner told Ms. Edwards that her failure to follow his directive constituted insubordination. Shortly thereafter, Mr. Bruner received a call from Ms. Cole and described the situation. Ms. Cole told Mr. Bruner to convey to Ms. Edwards that she needed to comply with the directive to remove the piercing or replace it with a clear plastic plug or her employment would be terminated. The employer issued a written reprimand to Ms. Edwards the same day, had her sign her acknowledgment of the reprimand, and provided her with a copy of the

reprimand. The reprimand stated that, "Any further incidents will result in termination or suspension."

In making the decision to discharge Ms. Edwards from the employment, the employer also considered a written reprimand issued to Ms. Edwards on July 30, 2012 for repeated failure to follow directives issued by Mr. Ho, her immediate supervisor. Ms. Edwards did not want to do tasks assigned to her by Mr. Ho. Ms. Edwards would tell Mr. Ho that she would get to the task when she had time, that he could do it himself, and/or that it was not her job. Ms. Edwards disregarded Mr. Ho's directive to cease unnecessary conversations with other employees when there was work to do. Ms. Edwards was not paying attention to the department counter. Ms. Edwards was using her cell phone while on the clock in disregard of Mr. Ho's directive. Ms. Edwards was taking excessively long breaks. On July 30, the employer issued a reprimand that stated, "If Chrisha does not comply with the corrective plan of action it may result in disciplinary action up to and including termination."

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 evidence in the record establishes insubordination in connection with the employment. While the final incident by itself might not have been sufficient to establish misconduct, the evidence indicates that the final incident occurred as part of a pattern of behavior on the part of Ms. Edwards, wherein Ms. Edwards repeatedly refused, either by word or deed, to comply with reasonable directives issued by the employer. With regard to the final incident, it was within Ms. Day’s discretion to schedule staff to work in the Chinese Express area. Ms. Day specifically told Ms. Edwards that Mr. Hopson had worked in the Chinese Express area before and, therefore, was qualified to do the work. While the staffing decision may well have affected Ms. Edwards’ workday, it was not for Ms. Edwards to try to interfere with or undermine Ms. Day’s decision-making authority. Yet, that is specifically what Ms. Edwards tried to do by fomenting discord in her work area. Ms. Edwards’ conduct was unreasonable.

The final incident was not the most egregious instance of insubordination on the part of Ms. Edwards. In September, Ms. Edwards twice knowingly violated the employer’s policy regarding facial piercings and twice willfully disregarded the Human Resources Manager’s

directive that she comply with the dress code policy. The employer reasonably did not want Ms. Edwards to gross out customers who came to purchase food at the Chinese Express. Ms. Edwards placed her own desire to make a fashion statement that was inappropriate in the context of her work environment over the employer's legitimate interests.

There is sufficient evidence in the record to establish that Ms. Edwards' insubordinate conduct did not start with Mr. Bruner in September, but had started earlier. Specifically, there is sufficient evidence to establish that Ms. Edwards had earlier unreasonably refused to follow reasonable directives from her immediate supervisor.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Edwards was discharged for misconduct. Accordingly, Ms. Edwards is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

DECISION:

The Agency representative's November 2, 2012, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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