

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JESSICAH S MALLORY
Claimant

APPEAL NO. 12A-UI-11263-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 08/19/12
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 September 10, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 15, 2012. Claimant Jessica Mallory participated. Julia Day of Corporate Cost Control represented the employer and presented testimony through Mark Prendergast. Exhibits One through Eight were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jessica Mallory was employed by Hy-Vee on a part-time basis from December 2011 until August 19, 2012, when Ryan Roberts, Store Director, discharged her for cash register shortages. Ms. Mallory is 18 years old. Ms. Mallory started the employment as a cashier and was moved to the customer service counter in April 2012. It was then that her cash register problems began. Ms. Mallory thought she would receive a week of training on the various special transactions the customer service area handled, including postage transactions, but received only a day of training. During her first week at the customer service counter, Ms. Mallory made two errors during back-to-back shifts that resulted in a \$79.54 drawer shortage in the first instance and a \$21.45 shortage in the second instance. The employer issued a reprimand on April 18 with regard to both matters. The next cash register shortage that factored into the discharge occurred on July 21, when Ms. Mallory made an error that resulted in a \$53.19 drawer shortage.

The final drawer shortage that triggered the discharge occurred on August 16, 2012, when Ms. Mallory made an error ringing up a transaction and the error resulted in the cash register drawer showing a \$49.99 shortage. The error on August 16 involved a miscommunication between Ms. Mallory and a customer about whether the customer wanted to pay *all* of a bill or *half* of a bill. Ms. Mallory rang up the entire bill amount before the customer clarified they

wanted to pay just half. Ms. Mallory made a note on the receipt and addressed the transaction with a supervisor before she left for the evening. Ms. Mallory thought the matter was resolved before she left work that day. The employer estimates that Ms. Mallory waited on about 200 customers during that shift. On August 19, the employer notified Ms. Mallory she was discharged from the employment.

The employer had a policy that subjected cashiers to written corrective action if they had a cash register shortage of \$5.00 or more. Under the policy, the first violation was to result in a written communication, the second was to result in a written communication coupled with a warning, and the third shortage within a six-month period was to result in discharge from the employment. Ms. Mallory was aware of the policy and it was reviewed with her at the time she was counseled regarding the prior cash register shortages.

The employer did not have any reason to believe that Ms. Mallory engaged in any intentional wrongdoing to cause any of the cash register shortages.

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).

The evidence in the record fails to establish misconduct in connection with the employment. With regard to the final incident, Ms. Mallory provided a plausible and credible explanation of why the drawer might have appeared short. The employer did not provide testimony from anyone with first-hand knowledge of that incident to rebut Ms. Mallory’s testimony concerning the matter. The evidence indicates two cash register errors during Ms. Mallory’s first days working at the customer service counter. These initial errors were due to lack of training and lack of familiarity with handling the special transactions at the customer service counter. The evidence establishes one additional error in July 2012. The employer provided testimony regarding the large number of customers Ms. Mallory might wait on during the shift. The employer also testified that upon review of video surveillance in connection with the final incident, the employer found many examples of Ms. Mallory properly handling transactions. A reasonable person would expect there to be occasional errors in light of the high-volume work that Ms. Mallory did for the employer. While the errors involve some degree of carelessness, the evidence does not establish a pattern of carelessness sufficient to indicate a willful or wanton disregard of the employer’s interests.

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

DECISION:

The Agency representative's September 10, 2012, 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