

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

BRANDI K PENA
Claimant

APPEAL NO. 18A-UI-01315-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KOPETSKY INC
Employer

OC: 12/31/17
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Administrative Code rule 871-24.32(8) Current Act Requirement

STATEMENT OF THE CASE:

Brandi Pena filed a timely appeal from the January 26, 2018, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Pena was discharged on December 15, 2017 for misconduct in connection with the employment. After due notice was issued, a hearing was held on February 15, 2018. Brandi Pena participated. Kenneth Kopetsky represented the employer. Exhibits 1 through 7 and A through D were received into evidence. The hearing was moved up by agreement from its original February 22, 2018 hearing date. The parties waived the 10-day formal notice requirement so that the hearing could proceed on February 15, 2018.

ISSUES:

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

Whether the discharge was based on a current act of misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kopetsky, Inc. has an Ace Hardware franchise and operates hardware stores in Orange City, Iowa and Yankton, South Dakota. Brandi Pena was employed by Kopetsky as a full-time sales associate at the Orange City store from August 2017 until December 15, 2017, when Kenneth Kopetsky, General Manager, and Ryan Huizenga, Store Manager for the Orange City store, discharged her from the employment. Mr. Huizenga was Ms. Pena's immediate supervisor.

The discharge was based on Ms. Pena's unauthorized re-use of a \$25.00 Ace VISA customer loyalty rewards coupon on October 26, 2017. The Ace Corporation had issued the \$25.00 coupon to a particular Orange City customer, Bonnie Juffer, as part of a customer loyalty rewards program. On September 2, 2017, Ms. Juffer redeemed the rewards coupon at the Orange City store. Ms. Pena rang up Ms. Juffer's purchase and received the \$25.00 Ace VISA customer loyalty rewards coupon from Ms. Juffer. Ms. Pena does not know Ms. Juffer and had no relationship with Ms. Juffer beyond having rung up Ms. Juffer's September 2, 2017 transaction. The invoice from the transaction reflects that Ms. Pena handled Ms. Juffer's

transaction. To ring up a customer, Ms. Pena would have to log onto the point-of-sale (register) by entering her initials (BKP) and by entering her four-digit password. The invoice identifies the clerk assisting Ms. Juffer as BKP. The invoice also reflects the unique identification number assigned to the Ace VISA rewards coupon: HH13632. Rather than deface and discard the customer loyalty rewards coupon following the transaction so that it could not be used again, Ms. Pena kept the \$25.00 coupon without authorization to do so. On October 26, 2017, Ms. Pena used the same \$25.00 Ace VISA rewards coupon to obtain a \$25.00 discount in connection when purchasing a \$55.00 North Face Jacket. Ms. Pena was also able to use her employee discount in connection with the purchase. The invoice from the purchase reflects that Ms. Pena made the purchase and that she used the uniquely numbered \$25.00 customer loyalty rewards coupon, HH13632, in connection with the purchase.

Ms. Pena's October 26, 2017 transaction came to the employer's attention during the second week of November 2017. At that time, Zach Woldruff, Assistant Store Manager, contacted Ken Kopetsky, General Manager, at the employer's Yankton store for clarification of what the "Co-Brand" Ace VISA coupon was and whether Ms. Pena would have received one from the Ace Corporation. To get answers to Mr. Woldruff's questions, Mr. Kopetsky had to contact the Ace Corporation. It took a couple days for the Ace Corporation to respond. The Ace Corporation advised Mr. Kopetsky that only two customers of Orange City store had at that point qualified for the Ace Visa rewards coupon and that only one such coupon had been mailed to a customer of the Orange City store. That customer was Bonnie Juffer. The Ace Corporation identified the customer by name and home address. Ms. Pena had not earned and had not received an Ace VISA rewards coupon. Ace advised Mr. Kopetsky to contact Ace in-house loss prevention representative, Matthew Harper.

After Mr. Kopetsky had contacted the Ace Corporation with his questions, Mr. Kopetsky and Mr. Huizenga interviewed Ms. Pena about the October 26, 2017 transaction involving the \$25.00 Ace VISA rewards coupon. That interview took place during the second week of November 2017. Ms. Pena told the employer she had made the October 26 purchase in question and that she had used the \$25.00 Ace VISA coupon in connection with the purchase. Ms. Pena told the employer that Bonnie Juffer was her aunt and that Ms. Juffer resided in Le Mars. That information was false. Ms. Pena knew the information was false at the time she provided it to the employer. Ms. Pena told the employer that she received the coupon in response to asking her relatives whether they had any Ace coupons she could use to make a purchase. That assertion to the employer was also an intentionally false statement. During the interview, Ms. Pena showed the employer a photo of the \$25.00 coupon on her cell phone. Mr. Kopetsky told Ms. Pena that he was going to look into the matter further. Mr. Kopetsky did not say anything to Ms. Pena at the time of the interview to put her on notice that her job was in jeopardy. Immediately following the interview, Mr. Huizenga pointed out to Mr. Kopetsky that Ms. Pena's assertion that Ms. Juffer lived in Le Mars was false.

On December 11, 2017, Mr. Kopetsky made further contact with the Ace Corporation and received additional guidance that he should contact and speak with Ms. Juffer. On December 11, Mr. Kopetsky spoke with Ms. Juffer by telephone. Ms. Juffer confirmed that she had used the \$25.00 Ace VISA rewards coupon on September 2, 2017 and that she had not otherwise transferred the coupon to anyone. Ms. Juffer confirmed that she was not related to Ms. Pena and did not know Ms. Pena.

On December 15, 2017, Mr. Huizenga notified Ms. Pena that she was discharged from the employment for using the \$25.00 Ace VISA rewards coupon and for being on her cell phone too much. Though the employer lacked a formal cell phone policy, Zach Woldruff, Assistant Store Manager, had on two occasions spoken to Ms. Huizenga about using her cell phone while on duty. These discussions followed instances wherein Ms. Huizenga used her cell phone on the sales floor and/or in the register area. The most recent such cell phone use had taken place within a week prior to the discharge. Some of the cell phone use followed a motor vehicle

collision in which Ms. Pena's car was damaged was related to Ms. Pena's attempt to resolve that issue.

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). 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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The weight of the evidence establishes that Ms. Pena's testimony and other evidence concerning how she came to be in possession of the \$25.00 rewards coupon she used for the October 26, 2017 purchase is not credible. Ms. Pena has gone to some effort to belatedly put forth a highly implausible story. The weight of the evidence establishes that the truth of how Ms. Pena came to use the \$25.00 coupon is much simpler and straightforward.

The weight of the evidence indicates that Ms. Pena knowingly and intentionally converted Ms. Juffer's \$25.00 Ace VISA rewards coupon to Ms. Pena's personal use to obtain an unauthorized \$25.00 discount in connection with an October 26, 2017 purchase. The employer correctly points out that the conduct constituted theft from the employer. See Iowa Code section 714.1(2):

A person commits theft when the person does any of the following:

...

2. Misappropriates property which the person has in trust, or property of another which the person has in the person's possession or control, whether such possession or control is lawful or unlawful, by using or disposing of it in a manner which is inconsistent with or a denial of the trust or of the owner's rights in such property, or conceals found property, or appropriates such property to the person's own use, when the owner of such property is known to the person.

The misappropriated property in question included the Ace VISA rewards coupon, the \$25.00 value assigned to that coupon, and the \$25.00 unauthorized discount Ms. Pena received off the purchase price of the North Face jacket. Ms. Pena was authorized to handle the coupon consistent with the Ace VISA customer loyalty rewards program, but not authorized to convert to her own use for personal gain.

The weight of the evidence also establishes that Ms. Pena knowingly and intentionally provided false information to the employer in connection with the interview that took place during the "second week" of November 2017. The weight of the evidence also establishes that the employer knew at that time that Ms. Pena's story did not add up. The employer did not say anything in connection with the meeting to put Ms. Pena on notice that her employment was in jeopardy. Instead, the employer stated only that the employer was going to further investigate the matter. The employer then waited a month to take any further action on the matter. In the meantime, Ms. Pena continued to report for work and perform her duties. The employer has failed to provide a reasonable basis for that month-long delay. It appears that after the

employer spoke to Ms. Pena during the second week of November 2017 that the employer did nothing further on the matter until December 11, 2017, at which time Mr. Kopetsky spoke further with the Ace Corporation and then spoke to Ms. Juffer. After the employer spoke with Ms. Pena during the second week of November, the employer did not further address the matter with her until December 15, 2017, at which time the employer discharged her from the employment. Though the evidence establishes misconduct in connection with the October 26, 2017 use of the coupon and the false statements during the interview that took place during the “second week” of November, none of that conduct constituted a “current act” at the time of discharge. Accordingly, the conduct cannot serve as a basis for disqualifying Ms. Pena for unemployment insurance benefits. See Iowa Administrative Code rule 871-24.32(8).

The weight of the evidence in the record fails to establish misconduct in connection with the employment based on Ms. Pena’s cell phone use. The employer lacked a cell phone use policy. The employer presented no testimony from persons with personal knowledge of Ms. Pena’s cell phone use. Ms. Pena asserts that some of the cell phone use was necessary to address and resolve issues related to a motor vehicle collision and that Mr. Woldruff merely asked her to use her cell phone in another area of the store. The employer presented insufficient evidence to rebut Ms. Pena’s testimony regarding the cell phone use issue.

Because the discharge was not based on a “current act,” the discharge was for no disqualifying reason. Accordingly, Ms. Pena is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged for benefits.

DECISION:

The January 26, 2018, reference 01, decision is reversed. The discharge was not based on a current act. Accordingly, 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/rvs