

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LORETTA J FENNEL
Claimant

APPEAL NO. 15A-UI-12687-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 10/18/15
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Loretta Fennel filed a timely appeal from the November 6, 2015, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits; based on an Agency conclusion that Ms. Fennel had been discharged on October 16, 2015 for misconduct in connection with the employment. After due notice was issued, a hearing was held on December 4, 2015. Ms. Fennel participated. James Transfaglia of Corporate Cost Control represented the employer and presented testimony through Tim Michael and Sandra Murphy. Exhibits One and Two were received into evidence.

ISSUE:

Whether Ms. Fennel 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: Loretta Fennel was employed by Hy-Vee as a part-time kitchen clerk from September 2014 until October 16, 2015; when Tim Michael, Store Director, discharged her from the employment for consuming food from Hy-Vee without purchasing it prior to consumption. At the start of her employment, Ms. Fennel received a copy of the employee handbook. The handbook set forth the employer's Code of Conduct. The Code of Conduct included the following: "Purchase of merchandise requires a paid receipt to be with the purchaser or attached to the item prior to use or consumption." Ms. Fennel was aware of the work rule. On October 15, 2015, Ms. Fennel fixed herself a meal and then sat down in the employer's dining area and consumed the meal. A fellow clerk was aware that Ms. Fennel had not purchased the meal and reported the conduct to Mr. Michael. Mr. Michael approached Ms. Fennel while she was consuming the meal. Ms. Fennel told Mr. Michael that she was planning to pay for the meal later but could not afford to pay for the meal at the time. The employer, on occasion, enters into agreement with an employee to allow the hungry employee to consume food with an arrangement for later payment and documentation of the transaction. Ms. Fennel had made no such arrangement with the employer prior to consuming the dinner she made for herself on October 15, 2015.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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).

The weight of the evidence in the record establishes that Ms. Fennel knowingly violated the employer's Code of Conduct on October 15, 2015 by not purchasing a meal before she consumed it. If Ms. Fennel lacked money to pay for the meal, she could have contacted the store management to request permission to consume the meal with a promise to pay later. Ms. Fennel made no attempt to enter into such an arrangement on October 15, 2015. Ms. Fennel's conduct violated the standards of conduct the employer reasonably expected of her and constituted misconduct in connection with the employment. Accordingly, Ms. Fennel 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.

DECISION:

The November 6, 2015, reference 01, decision is affirmed. The claimant was discharged on October 16, 2015 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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