

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN E PHELPS

Claimant

APPEAL NO. 06A-UI-09547-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ORSCHELN FARM & HOME LLC

Employer

**OC: 11/13/05 R: 03
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Kevin Phelps filed a timely appeal from the September 21, 2006, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on October 11, 2006. Mr. Phelps participated. Store Manager Ann Delaney represented the employer. Employer's Exhibit One was received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kevin Phelps was employed by Orscheln Farm & Home as an assistant manager trainee from January 23, 2006 until August 29, 2006, when Store Manager Ann Delaney discharged him. Ms. Delaney was Mr. Phelps immediate supervisor.

Mrs. Phelps was in the habit of visiting the store while Mr. Phelps was working. This would occur every day or every other day. Mrs. Phelps was not an employee of Orscheln. Mrs. Phelps sometimes lingered for extended periods. Mrs. Phelps would take it upon herself to assist customers or perform other work in the store and would enter areas of the store that were not open to the public. Two months prior to the employment separation, Ms. Delaney discovered Mrs. Phelps loitering in the employer's tire shop for two hours while Mr. Phelps worked in that area. Ms. Delaney was concerned about Mrs. Phelps interfering with Mr. Phelps' work and was further concerned about the employer being exposed to increased liability when Mrs. Phelps was in areas of the store where customers would not be allowed. Shortly after this incident, Ms. Delaney told Mr. Phelps that Mrs. Phelps could not be at the store every day. Ms. Delaney also directly addressed Mrs. Phelps and told her that she was not allowed to perform work at the store. On other occasions, Ms. Delaney made similar comments to Mr. Phelps in similar circumstances. Each time, Mr. Phelps indicated he would address the matter with his spouse.

The final incident that prompted the discharge occurred on August 29. Mr. Phelps' wife had come to the store while Mr. Phelps was working at the front counter. While Mrs. Phelps was visiting with Mr. Phelps at the counter, a customer approached and asked for assistance with windmills. Mrs. Phelps indicated she would help the customer and proceeded to the windmill area. Mr. Phelps knew that Ms. Delaney and another employee were in the store, but did not use the available intercom system to summon a coworker to assist the customer. While Mrs. Phelps was assisting the customer, one or more windmills were knocked over and caused a loud crash that summoned Ms. Delaney to the front of the store. Ms. Delaney approached Mr. Phelps at the front counter and stated, "Am I going to have to kick her out?" Mr. Phelps told his wife that she would have to leave the store and Mrs. Phelps left the store. Mr. Phelps became angry. Mr. Phelps believed that Ms. Delaney was being disrespectful to him. Ms. Delaney told Mr. Phelps that company policy prohibited his wife from helping customers. Mr. Phelps yelled at Ms. Delaney and demanded that Ms. Delaney treat him with respect. Mr. Phelps indicated that he no longer wished to become the assistant manager of the store. Mr. Phelps had been hired as the assistant manager trainee and this was the only position the employer had available for him. At some point, Ms. Delaney left the register area and went to an office area. Mr. Phelps followed Ms. Delaney for the purpose of continuing the challenge to her authority and to demand respect. Mr. Phelps announced that he, too, had retail experience. Ms. Delaney told Mr. Phelps, "That's it. This is your last warning." Mr. Phelps then returned to the register.

Mr. Phelps' outburst prompted Ms. Delaney to contact the employer's human resources department to discuss the situation. Though Ms. Delaney had repeatedly counseled Mr. Phelps regarding his spouse loitering at the workplace and/or assisting customers, there had been no prior similar outbursts on the part of Mr. Phelps. While Ms. Delaney was on the phone with the human resources department, a customer needed assistance outside. Mr. Phelps could not leave the register without having someone to replace him there. Mr. Phelps saw Ms. Delaney on the telephone and yelled at Ms. Delaney from the register, "You're on the phone and I need to help a customer!" Mr. Phelps made no attempt to have the other employee assist the customer in question or replace him at the register. Based on the outbursts, Mr. Phelps' announcement that he no longer intended to become the assistant manager, and based on instructions received from the human resources department, Ms. Delaney discharged Mr. Phelps from the employment.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Phelps was discharged for misconduct in connection with the employment. It does.

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).

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).

An employer has the right to expect decency and civility from its employees and an employee's use of offensive language in a confrontational, disrespectful, or name-calling context may be

recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995).

In considering the evidence in this matter the administrative law judge must consider the extent to which Mr. Phelps was responsible for his wife's conduct at the store. The administrative law judge must also consider the employer's right to direct the employment and store operations generally. The greater weight of the evidence indicates that the employer had clearly communicated its expectations to Mr. Phelps about his wife not loitering at the store and not assisting customers. The greater weight of the evidence indicates that despite multiple discussions of the matter, Mr. Phelps continued to facilitate his wife's frequent visits and her unauthorized conduct at the store. The employer's request that Mr. Phelps limit his wife's visits to the store and not allow her to perform work there was reasonable. Mr. Phelps' refusal to comply with the request was not reasonable. The pattern of behavior, including the final incident, demonstrated insubordination. The evidence in the record further demonstrates that on August 29, Mr. Phelps became belligerent and directly challenged his supervisor's authority to direct his work on repeated occasions. This involved Mr. Phelps repeatedly yelling at the supervisor. The employer had the right to expect civil behavior from Mr. Phelps at all times and his belligerence amounted to willful and wanton disregard of the interests of the employer as well as intentional violation of the standards of behavior the employer reasonably expected of him.

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

DECISION:

The Agency representative's September 21, 2006, reference 02, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw