

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FRANKIE E KENNISON
Claimant

APPEAL NO. 17A-UI-00643-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 12/11/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Frankie Kennison filed a timely appeal from the January 11, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Mr. Kennison was discharged on December 10, 2016 for conduct not in the best interest of the employer. After due notice was issued, a hearing was held on February 8, 2017. M. Kennison initially participated in the hearing, but terminated his participation during the employer's testimony. Mr. Kennison did not question employer witnesses and did not testify. Bruce Burgess of Corporate Cost Control represented the employer and presented testimony through Stacy Sassman and Ryan Miller. Exhibits 1 through 5 were received into evidence.

Mr. Kennison terminated his participation 26 minutes and 55 seconds into the hearing. Though Mr. Kennison asserted that he was running out of minutes on his phone, the circumstances of his early departure suggest another reason for his departure from the hearing. Before Mr. Kennison left the hearing, he refused to enter into discussion with the administrative law judge aimed at facilitating his further involvement in the hearing. In the eight days between the appeal hearing and entry of this decision, Mr. Kennison has made no contact with the Appeals Bureau to indicate interest in further participation in the matter.

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: Frankie Kennison was employed by Hy-Vee as a part-time bottle and can redemption clerk from 2011 until December 10, 2016, when Assistant Manager discharged him from the employment for directing offensive and aggressive behavior toward a customer. Mr. Kennison is a person with one or more disabilities that necessitated the assistance of a job coach when he began in the Hy-Vee employment. Mr. Kennison was subsequently able to perform his work duties without the assistance of a job coach.

The incident that triggered the discharge occurred on December 9, 2016. Mr. Kennison was assigned to perform his usual duties in the customer service area. A customer approached with a considerable number of recyclable cans to redeem. Mr. Kennison was emptying trash containers when the customer approached. When Mr. Miller asked Mr. Kennison to assist the customer, Mr. Kennison said he did not have time. Mr. Kennison then began to assist the customer. Mr. Kennison told the customer that the cans were dirty and that he could not accept them. Mr. Miller asked Mr. Kennison to go back to emptying the trash receptacles. Mr. Kennison became agitated. Mr. Miller asked Mr. Kennison to calm down. Mr. Kennison continued to tell the customer that the cans were too dirty. Mr. Kennison told the customer, "Sir, we are not going to accept these fucking cans. They are fucking dirty." Mr. Miller again asked Mr. Kennison to step away and empty the garbage. Mr. Kennison then threw a can at the customer and hit the customer in the arm. The customer appeared shocked, but remained calm. Mr. Kennison then threw another can at the customer and hit the customer in the chest. Mr. Kennison then threw a third can at the customer and hit the customer in the shoulder, near the customer's face. Mr. Miller stepped in front of Mr. Kennison. The customer asked Mr. Kennison to please stop throwing cans. Mr. Miller also asked Mr. Kennison to stop throwing cans. Mr. Kennison continued to appear frustrated, but left the area and went to a back room. Mr. Kennison later returned to the area in a calm state.

Prior to the incident that triggered the discharge, Mr. Kennison had been involved a prior, somewhat similar incidents that resulting in formal coaching in September 2015. In those instances, Mr. Kennison became upset, angry, and verbally critical with a customer who was putting plastic grocery bags in a garbage can and with how another customer who was putting out the customer's cigarette in an ashtray outside the store's entrance. Mr. Kennison was upset that the first customer was filling the garbage cans with plastic bags. Mr. Kennison was upset with the second customer because he did not think the customer had sufficiently put out his or her cigarette. At the time of the coaching, Mr. Kennison was apologetic and stated that the conduct would not happen again.

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 evidence in the record establishes misconduct in connection with the employment based on Mr. Kennison's offensive language and conduct on December 9, 2016. An employer has the right to expect decency and civility from its employees and an employee's use of profanity or 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). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984). The customer in question on December 9, certainly had a similar right to expect decency and civility when transacting business with Hy-Vee and its employee, Mr. Kennison. Mr. Kennison directed vulgar language at the customer on December 9. The conduct was wholly inappropriate and wholly unjustified. Iowa Code Section 708.1(2) defines the criminal offense of assault. Assault includes any unjustified act intended to result in physical contact which will be insulting or offensive to another. Mr. Kennison assaulted the customer on December 9, by throwing cans at the customer. Mr. Kennison's aggressive conduct was wholly unjustified. Mr. Kennison's conduct on December 9, demonstrated an intentional and substantial disregard of the Hy-Vee's interests. The prior coaching indicates that the final

incident was not the first time that Mr. Kennison directed inappropriate conduct at a Hy-Vee customer.

Because Mr. Kennison was discharged for misconduct in connection with the employment, he is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Kennison must meet all other eligibility requirements. The employer's account shall not be charged.

DECISION:

The January 11, 2017, reference 01, decision is affirmed. The claimant was discharged on December 10, 2016 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs