

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LARA K JUHL
Claimant

APPEAL NO. 09A-UI-07372-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 04/19/09
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 12, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 8, 2009. Claimant Lara Juhl participated. Tim Spier of Unemployment Insurance Services represented the employer and presented additional testimony through Adam Krepela, Store Director; Jarrod Vanderloo, Service Meat Manager; and Sheila Hoffman, Retail Product Manager. At the request of the employer, the administrative law judge took official notice of the documents submitted or generated in connection with the May 11, 2009 fact-finding interview. A copy of those materials was provided to the parties on May 21, 2009.

ISSUE:

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.”

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lara Juhl was employed by Hy-Vee in Le Mars from September 2005 until April 5, 2009. Ms. Juhl started her employment as a part-time pharmacy tech. Ms. Juhl was a full-time assistant manager during the final three years of her employment. Ms. Juhl’s immediate supervisors were Bryce Rabeling, Assistant Store Director, and Sheila Hoffman, Retail Product Manager.

The incident that triggered the discharge occurred on March 17, 2009. Ms. Juhl and Sheila Hoffman, Retail Product Manager, were looking for an important notebook in an office where Jarrod Vanderloo, Service Meat Manager, was seated at a desk using a computer to take an employment-related test. Ms. Hoffman was to Mr. Vanderloo’s left searching for the notebook. Ms. Juhl was to Mr. Vanderloo’s right up on the counter looking for the notebook. When Ms. Hoffman realized Mr. Vanderloo was taking a test, she asked if they were bothering him. Mr. Vanderloo indicated they were not. Ms. Juhl then turned toward Mr. Vanderloo, rested her

bosom on Mr. Vanderloo's head and asked, "How about now?" Mr. Vanderloo pulled his head away and uttered something about the conduct being harassment. Ms. Juhl said it was not harassment because she and Mr. Vanderloo were "family." Ms. Juhl's fiancé is Mr. Vanderloo's cousin. Ms. Hoffman told Ms. Juhl that she had better be careful.

On March 18, Mr. Vanderloo spoke to Ms. Hoffman about Ms. Juhl's conduct the previous day and his belief that the conduct was harassment. Ms. Hoffman told Mr. Vanderloo that he should report the matter to Store Director Adam Krepela and reminded him that the company had a zero tolerance for harassment. Ms. Hoffman was not interested in reporting the matter to Mr. Krepela. This position was a response to prior interpersonal conflict between Ms. Hoffman and Ms. Juhl and Mr. Krepela's previous admonishment that both could lose their jobs if the conflict continued.

Mr. Vanderloo delayed in reporting the matter to Mr. Krepela. Mr. Vanderloo was concerned about the impact his report of harassment could have on his family relations.

On April 3, Mr. Vanderloo told Mr. Krepela of the March 17 incident. On April 5, Mr. Krepela summoned Ms. Juhl to a meeting, at which he notified Ms. Juhl that he was demoting her to overnight gas station clerk with an associated decrease in pay. Ms. Juhl did not deny the allegation that she had engaged in sexually harassing behavior. Ms. Juhl requested time to consider the proposed demotion. Ms. Juhl left the store shortly after the meeting. While Ms. Juhl was enroute home, Mr. Krepela telephoned Ms. Juhl. Mr. Krepela notified Ms. Juhl that he had changed his mind about the demotion and that Ms. Juhl was discharged from the employment.

The employer has a corporate policy and store code of conduct that prohibit harassment including sexual harassment. Ms. Juhl was aware of both policies and was responsible for informing employees of the policy.

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).

The evidence in the record fails to establish a current act of misconduct. The incident that triggered the discharge occurred on March 17, 2009 in the presence of Ms. Hoffman, who was Ms. Juhl's immediate supervisor. In other words, the employer was aware of the offending conduct on March 17, 2009. Ms. Hoffman issued a very mild verbal admonishment and elected, for personal reasons, not to take further action on the conduct. This included not reporting the matter to Mr. Krepela. Ms. Hoffman's prior interpersonal conflict with Ms. Juhl did not provide a reasonable basis for delaying further action on the matter. Though Mr. Krepela only became aware of the conduct on April 3, Mr. Krepela's first knowledge of the matter did not constitute "the employer's" first knowledge of the incident. The employer delayed until April 5 to notify Ms. Juhl that the March 17 conduct placed her position or employment in jeopardy. At that point, the March 17 incident no longer constituted a "current act."

Because the discharge was not based on a current act, the administrative law judge concludes that Ms. Juhl was discharged for no disqualifying reason. Because the evidence fails to establish a current act, the administrative law judge need not rule on whether the conduct was indeed misconduct. Ms. Juhl is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Juhl.

DECISION:

The Agency representative's May 12, 2009, reference 01, decision is affirmed. The discharge was not based on a current act. 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