

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CYDNEY KOEHN
Claimant

APPEAL NO. 11A-UI-09475-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 06/12/11
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Cydney Koehn filed a timely appeal from the July 9, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 19, 2011. Ms. Koehn participated and was represented by Christine Branstad, attorney at law. Alice Rose Thatch of Corporate Cost Control represented the employer and presented testimony through Kevin Jurasek, Kim Burrow, and Linda Threlkeld. Exhibits One through Four, A through O, and Q were received into evidence.

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: Cydney Koehn was employed by Hy-Vee as a full-time sous chef at the Hy-Vee Conference Center until June 14, 2011, when the employer discharged her from the employment. Ms. Koehn's immediate supervisor was Chef Kim Burrow. The final incident that triggered the discharge occurred on June 14. On that day, Chef Burrow gave Ms. Koehn a special apron he had received in connection with a promotional event involving celebrity chef Curtis Stone. Ms. Koehn had not been allowed to participate in the event because the employer needed her to perform her regular duties. When Chef Burrow gave the apron to Ms. Koehn she asked whether it was a guilt gift. Ms. Koehn was disappointed that she had not been able to participate in the event with Chef Stone. When Chef Burrow reported the interaction to Kevin Jurasek, director of the Hy-Vee Conference Center, and Linda Threlkeld, assistant vice president of human resources in administration, they deemed Ms. Koehn's conduct insubordination and decided to discharge Ms. Koehn from the employment.

In making the decision to discharge Ms. Koehn from the employment, the employer considered an incident involving a disagreement involving Ms. Koehn and other staff on April 1. Another staff member was upset that Ms. Koehn had left work early the day before, though Ms. Koehn's early departure had been approved. On April 1, Mr. Jurasek entered the kitchen as the matter

was being discussed. At the time, Ms. Koehn was preoccupied with getting food out in a timely manner. Mr. Jurasek removed Ms. Koehn and other staff from the kitchen to further address the matter. After he later disbursed the group, he saw Ms. Koehn and a coworker continuing the disagreement. Ms. Koehn was on the receiving end of the other staff member's wrath, but this was lost on Mr. Jurasek, who erroneously concluded that Ms. Koehn was continuing the disagreement.

In making the decision to discharge Ms. Koehn from the employment, the employer considered another matter in early March 2011. Ms. Koehn had brought in a piece of wallboard that she thought would work well to fix a damaged portion of a wall. Chef Burrow mentioned this to Mr. Jurasek, who instructed Chef Borrow to thank Ms. Koehn for the thought, but to indicate that the employer would buy the materials needed to fix the wall. When Chef Burrow passed along the information, Ms. Koehn erroneously interpreted the communication as her being scolded by the employer.

In making the decision to discharge Ms. Koehn from the employment, the employer considered another incident wherein Mr. Jurasek summoned Chef Burrow and Ms. Koehn to meet with him. Mr. Jurasek actually wanted to speak with them separately, but Ms. Koehn had been unaware of this when she received the summon to speak with Mr. Jurasek. When Ms. Koehn appeared at the same time as Chef Burrow, Mr. Jurasek directed Ms. Koehn to return to the kitchen until he was ready for her. When Ms. Koehn asked Chef Borrow whether that is what he wanted her to do, Mr. Jurasek interpreted this as insubordination and told her it was what *he* wanted her to do.

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).

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).

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).

The weight of the evidence in the record fails to establish misconduct on the part of Ms. Koehn. The final incident involved only a mild expression of disappointment, not insubordination. Ms. Koehn's expression of disappointment was to be expected under the circumstances. The expression itself was inconsequential and did not warrant the response it provoked. The weight of the evidence indicates that the personality conflict between Mr. Jurasek and Ms. Koehn factored heavily in the final incident and in the prior incidents that factored in the discharge. For some reason, Ms. Koehn got under the employer's skin, though the evidence indicates no insubordination or other conduct that might be deemed misconduct under the applicable law. The evidence indicates instead that Ms. Koehn performed her duties to the best of her ability and was discharged for no disqualifying reason. Ms. Koehn is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Koehn.

DECISION:

The Agency representative's July 9, 2011, reference 01, decision is reversed. 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/kjw