

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

SARAH A LINDSEY
Claimant

APPEAL NO. 17A-UI-13205-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 11/26/17
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 15, 2017, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on November 17, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on January 8, 2018. Claimant Sarah Lindsey participated. Jamie Hewitt represented the employer and presented additional testimony through Melissa Guevara. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which record indicates that no benefits have been disbursed to the claimant in connection with the claim. Exhibits 3 through 6 and 9 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 and that relieves the employer's account of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Sarah Lindsey was employed by Casey's Marketing Company as a part-time clerk at the Casey's Store in Ackley. Ms. Lindsey worked for the employer during two distinct periods. The first period of employment lasted three years and ended in October 2016. The most recent period of employment began on September 13, 2017 and ended on November 13, 2017, when Jamie Hewitt, Store Manager, discharged Ms. Lindsey from the employment. Ms. Hewitt was Ms. Lindsey's immediate supervisor throughout the most recent period of employment.

The final conduct that triggered the discharge began on November 7, 2017, when Ms. Lindsey obtained food from the Casey's food warmer and consumed a portion of the food without first paying for the food. The employer's written policy requires that employees first pay for food items before consuming them or removing them from the Casey's store. The policy is contained in the employee handbook. A copy of the handbook is kept at the Casey's store so that

employees may review the handbook at will. Ms. Lindsey was familiar with the food consumption policy, but elected to disregard it on November 7, 2017. The food item Ms. Lindsey obtained and began to consume without purchase was a \$3.49 order of bacon cheese potato wedges. As a Casey's employee, Ms. Lindsey was entitled to a 50 percent discount on all food purchases. Thus, the potato wedge order would only cost her \$1.75 plus tax. After Ms. Lindsey consumed a couple of the potato wedges, she experienced a restroom emergency, diarrhea, that made it necessary for her to leave work before the end of her shift. Ms. Lindsey spoke to Ms. Hewitt about her need to go home and change. Ms. Hewitt approved Ms. Lindsey's early departure from the shift. After Ms. Lindsey left, Ms. Hewitt realized that Ms. Lindsey had consumed a food item without prior purchase. Ms. Hewitt telephoned Ms. Lindsey, who was at that point at her home in Steamboat Rock. During the call, Ms. Lindsey confirmed that she had consumed the food item without paying for it. Ms. Hewitt reminded Ms. Lindsey of the food consumption policy and told her that her conduct constituted theft from the employer. Ms. Hewitt directed Ms. Lindsey to pay for the food item on the next day she worked. Ms. Lindsey agreed to do that.

After Ms. Lindsey left early on November 7, 2017 due to illness, Ms. Hewitt and Melissa Guevara, Food Service Manager, determined that Ms. Lindsey had handled multiple deli prep food items that day without wearing gloves. The employer's food handling policy, and food safety regulations, required that Ms. Lindsey wear gloves when handling food items. Ms. Lindsey had completed food safety training during her previous period of employment and was aware of the glove requirement throughout the most recent period of employment. For food safety reasons, the employer had to discard the entire contents of the deli prep area, disinfect the deli prep area, and restock the deli prep area with fresh food items.

Ms. Lindsey was next scheduled to work a six-hour shift on November 10, 2017. Ms. Lindsey worked the shift, but did not bring money to pay for the food item she consumed on November 7. During that shift Ms. Guevara issued a written reprimand to Ms. Lindsey for the November 7 food safety violation.

Ms. Lindsey was next scheduled to work a seven-hour shift, 3:00 a.m. to 10:00 a.m., on the morning of November 11. Ms. Lindsey worked the shift, but did not bring money to pay for the food item. During that shift, Ms. Hewitt spoke to Ms. Lindsey about her failure to pay for the food item. Ms. Lindsey said her significant other had used the couple's last \$10.00 to put gasoline in their car. Ms. Lindsey told Ms. Hewitt she could not pay until her next payday on Friday, November 17, 2017. Ms. Lindsey signed an agreement to pay for the food item on November 17, 2017.

On Monday, November 13, Ms. Hewitt spoke with the area manager about Ms. Lindsey. The area manager issued the directive that Ms. Lindsey report to the workplace and pay for the food item by 1:00 p.m. that day. Ms. Hewitt then called Ms. Lindsey at home to convey the directive. Ms. Lindsey again told Ms. Hewitt she could not pay until her next payday on Friday, November 17, 2017. Ms. Hewitt reminded Ms. Lindsey that she was supposed to have paid for the item during her next shift following November 7. Ms. Hewitt reiterated the food consumption policy. Ms. Lindsey stated "bullshit" and hung up on Ms. Hewitt. Over the noon hour, Ms. Guevara called Ms. Lindsey to repeat the directive that she was to appear by 1:00 p.m. to pay for the food item. Ms. Lindsey hung up on Ms. Guevara. Ms. Lindsey appeared as directed and paid for the food item. At that time, Ms. Hewitt notified Ms. Lindsey that she was discharged from the employment for using inappropriate language when speaking with the employer that day and for hanging up on Ms. Hewitt and Ms. Guevara.

The above events followed close after other conduct that factored in the discharge decision. On November 4, 2017, Ms. Lindsey attempted to steal a deli sandwich from the employer. Ms. Lindsey made the sandwich and then attempted to remove it from the workplace without the employer's knowledge and without paying for the sandwich. Ms. Lindsey took the item out of the building when she took some trash out. Ms. Lindsey tossed the sandwich in her car. Ms. Guevara observed Ms. Lindsey's conduct and asked her if she was going to pay for the sandwich. Ms. Lindsey lacked sufficient funds to cover the cost of the sandwich. On October 5, 2017, Ms. Hewitt issued a written reprimand to Ms. Lindsey for the violation of the food consumption policy. The reprimand included a warning that further similar conduct could result in termination of the employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

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).

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). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior’s authority. *Deever v. Hawkeye Window Cleaning, Inc.*, 447 N.W.2d 418 (Iowa Ct. App. 1989).

The evidence in the record establishes misconduct in connection with the employment based on knowing and intentional violation of the employer’s reasonable work rules, insubordination, and theft. The evidence establishes that Ms. Lindsey knowingly and intentionally violated the food consumption policy and attempted to commit theft on November 4. Ms. Lindsey received verbal and written reprimand for the conduct and then knowingly and intentionally violated the food consumption policy again on November 7. Ms. Lindsey then unreasonably failed to comply in a timely manner with the employer’s directive that she pay for the food item she consumed on November 7, \$1.75 plus tax. Only after several attempts to secure payment did Ms. Lindsey finally comply on November 13, 2017. The weight of the evidence establishes that on November 7 Ms. Lindsey knowingly, intentionally and unreasonably disregarded food safety rules and regulations by handling food without wearing gloves. All of the above conduct indicated intentional and substantial disregard of the employer’s interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Lindsey was discharged for misconduct. Accordingly,

Ms. Lindsey is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Lindsey must meet all other eligibility requirements. The employer's account shall not be charged for benefits. Because Ms. Lindsey has not received benefits in connection with the claim, there is no overpayment to address.

DECISION:

The December 15, 2017, reference 01, decision is reversed. The claimant was discharged for misconduct. 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 amount. 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