

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GARRETT A HARPER
Claimant

APPEAL NO. 10A-UI-09861-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**CASEY'S MARKETING COMPANY
CASEY'S GENERAL STORES**
Employer

**OC: 06/06/10
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 1, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 30, 2010. Claimant Garrett Harper participated. Store Manager Kathy Brown represented the employer. Exhibits One through Six 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: Garrett Harper was employed by Casey's Stores as a full-time clerk from March 2008 until June 3, 2010, when Store Manager Kathy Brown discharged him for eating a portion of a pizza that had not been paid for. Ms. Brown had become Mr. Harper's immediate supervisor in March 2010. On June 1, Mr. Harper was operating a cash register. Mr. Harper was working with Assistant Manager Barb Woolsey, who was also operating a cash register. There were several customers in the store waiting out storm/tornado warnings. Ms. Woolsey's boyfriend ordered a small pizza from the kitchen employee. Mr. Harper became busy with other duties and left the register area. Mr. Harper assumed that Ms. Woolsey had rung up the pizza and that the boyfriend had paid for the pizza. Barb's boyfriend offered Mr. Harper the last slice of pizza and Mr. Harper sat down and ate a slice of pizza, unaware that the pizza had not been purchased. The employer's written policies required that all food to be consumed by employees had to be paid for prior to consumption of the food. Mr. Harper was aware of the policy and received a copy of the handbook containing the policy. Mr. Harper was unaware that he was required to have proof of purchase under the circumstances in which he was offered and consumed a piece of pizza.

In making the decision to discharge Mr. Harper from the employment, Ms. Brown considered prior reprimands issued to Mr. Harper as an indication that Mr. Harper was not overly concerned

about the employment. On May 3, 2010, Ms. Brown issued reprimand to Mr. Harper after he left work early. On November 3, 2009, the prior manager issued a reprimand to Mr. Harper for allegedly failing to clean his assigned aisle between October 13 and November 3, 2009.

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).

The weight of the evidence indicates that Mr. Harper made a good faith error in judgment when he accepted a piece of pizza offered to him, assuming that pizza had been paid for. The weight of the evidence indicates that Mr. Harper was unaware he had to have proof of purchase under the circumstances or that he needed to inquire further into whether the pizza had been paid for. The weight of the evidence indicates that Mr. Harper had no intention to steal from the employer or to violate the employer's policies. Where there is no culpability, there can be no misconduct. The weight of the evidence fails to establish misconduct in connection with the incident that triggered Mr. Harper's discharge from the employment. Because there was no "current act" of misconduct, the administrative law judge need not further consider the prior reprimands.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Harper was discharged for no disqualifying reason. Accordingly, Mr. Harper is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Harper.

DECISION:

The Agency representative's July 1, 2010, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs