

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**CANDICE J EARNEST
302 S 14TH AVE
MARSHALLTOWN IA 50158-3013**

**GIT-N-GO CONVENIENCE STORES INC
2716 INDIANOLA AVE
DES MOINES IA 50315-2399**

**Appeal Number: 06A-UI-07775-JTT
OC: 07/09/06 R: 02
Claimant: Respondent (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Git-N-Go Convenience Stores filed a timely appeal from the July 26, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 17, 2006. Supervisor Linda McKelvey represented the employer. Claimant Candice Earnest did not participate. Employer's Exhibits Two and Three were received into evidence. Though the administrative law judge ruled that Exhibit One should not be received into evidence, the administrative law judge hereby reverses that ruling and receives Employer's Exhibit One into evidence. The administrative law judge took official notice of Clerk of Court records made available to the public at the Iowa Judicial Branch's official website, www.judicial.state.ia.us.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Candice Earnest was employed by Git-n-Go as a part-time cashier from November 29, 2005 until February 20, 2006, when Manager Kathy Holtry and Supervisor John Judge suspended her pending investigation of theft of lottery tickets. On March 20, Ms. Holtry subsequently discharged Ms. Earnest from the employment.

The final incident that prompted the discharge came to the attention of the employer on February 17, 2006 and concerned a discrepancy between the number of scratch-ticket lottery tickets on hand after Ms. Earnest's shift on February 16 and documented lottery tickets sales for that day. Manager Kathy Holtry noted a discrepancy between lottery tickets on hand and documented ticket sales after Ms. Earnest's June 14 and June 15 shifts and instructed Ms. Earnest to be careful to make certain that all items were rung up and rung up correctly. After the third discrepancy, Ms. Holtry sent surveillance videotapes for the shifts in question to the employer's office in Des Moines.

Once the surveillance videotapes were received at Des Moines, Supervisor Linda McKelvey reviewed the videotapes. Ms. McKelvey observed that on all three days there was an adult male at the counter who appeared to be a friend of Ms. Earnest. Ms. McKelvey observed that during each of the shifts there were times when Ms. McKelvey stepped out of the camera's view, the male helped himself to lottery tickets, and Ms. Earnest reentered the camera's view about 30 seconds after the theft occurred. Ms. Earnest would have been the only person on duty at the time the thefts occurred. Ms. Earnest had other duties that may have taken her away from the front counter. The employer expected Ms. Earnest to remain at the front counter so long as a customer was at the counter. The male at the counter did not appear to be an actual customer. Ms. McKelvey noted two such incidents in connection with two shifts and three similar incidents during the third shift. On February 19, Ms. McKelvey notified Supervisor John Judge of her observations. The employer subsequently provided the videotapes to the Marshalltown Police Department. When the employer questioned Ms. Earnest about the incidents, Ms. Earnest denied knowledge.

Clerk of Court records made available to public at the Iowa Judicial Branch's official website, www.judicial.state.ia.us, provide no indication that Ms. Earnest has been charged, prosecuted, or convicted of any criminal offense. The employer provided a Statement of Pecuniary Damages filed in Marshall County Case Number FECR065698 concerning Michael Dean Luethje. That document indicates a demand by the State of Iowa that Mr. Luethje pay Git-N-Go \$68.00 in restitution for stolen lottery tickets. The document indicates that Mr. Luethje and a Ms. Candice Trowbridge are to be jointly and severally liable for the restitute and references Marshall Case Number FECR065748. Ms. Earnest and Ms. Trowbridge appear to be the same person.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Earnest was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Code section 96.5-2-c 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:

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

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 is sufficient to prove by a preponderance of the evidence that thefts occurred during Ms. Earnest's shifts on February 14, 15 and 16 and that the thefts were perpetrated by someone familiar to Ms. Earnest. The evidence in the record does not demonstrate, by a preponderance of the evidence, that Ms. Earnest was aware of the thefts at the time they occurred, that she aided and abetted the thefts, or that she conspired to commit the thefts. Outside of consideration of the issue of gross misconduct, the administrative law judge has considered only information that was available to the employer at the time discharge in making the determination as to whether the evidence establishes misconduct under Iowa Code section 96.5(2)(a). That evidence does not in fact establish misconduct.

Nor does the evidence in the record establish gross misconduct. While the Statement of Pecuniary Damages is evidence that Ms. Earnest may have been *charged* with an indictable offense, the evidence does not establish that Ms. Earnest has admitted in writing to, or that she has been convicted of, an indictable offense. See Iowa Code section 96.5(2)(c). If the employer is able to produce such evidence, the employer may comply with the provisions set forth in Iowa Code section 96.5(2)(c) and make that information available to Iowa Workforce Development by the deadline set forth in Section 96.5(2)(c). If that occurs, the Agency will at that time consider anew whether Ms. Earnest should be disqualified for benefits based on a discharge for gross misconduct.

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

DECISION:

The Agency representative's July 26, 2006, reference 01, decision is affirmed. 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.

If the employer is able to produce evidence that Ms. Earnest has admitted in writing to, or has been convicted of, an indictable offense, the employer may comply with the provisions set forth in Iowa Code section 96.5(2)(c) and make that information available to Iowa Workforce Development by the deadline set forth in Section 96.5(2)(c). If that occurs, the Agency will at that time consider anew whether Ms. Earnest should be disqualified for benefits based on a discharge for gross misconduct.

jt/pjs