

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CARMEN M WINKEL-HIRACHETA
Claimant

APPEAL NO. 12A-UI-02921-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FOODS INC
Employer

OC: 01/29/12
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Carmen Hiracheta filed a timely appeal from the March 14, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 9, 2012. Ms. Hiracheta participated. Kevin Helm represented the employer.

ISSUES:

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: Carmen Hiracheta was employed by Foods, Inc., doing business as Dahl's, during two separate and distinct periods. The first period of employment started in December 2010 and ended in March 2011. The second period of employment started in August 2011 and ended on February 20, 2012, when Kevin Helm, store director, discharged Ms. Hiracheta from the employment. Ms. Hiracheta worked as a full-time cashier. Ms. Hiracheta lived across the street from the West Des Moines Dahl's store.

The incident that triggered the discharge occurred *at some point* between the week before Christmas 2011 and January 12, 2012 and involved Ms. Hiracheta removing merchandise from the store without paying for it. The employer had a policy that required employees to pay for merchandise before they consumed it or removed it from the store. The policy also required that employees have a receipt for the merchandise. Ms. Hiracheta was aware of the policy. Ms. Hiracheta took the unpaid for food items across the street to her children and returned with the money to pay for the items. At that point, the items were rung up by another employee and paid for by Ms. Hiracheta. Ms. Hiracheta presented her receipt to Assistant Manager Dale Davis and explained what she had just done. Mr. Davis told Ms. Hiracheta that she would need speak to Mr. Helm about the incident. Ms. Hiracheta spoke to Mr. Helm and told him what she

had done. Ms. Hiracheta provided the receipt to Mr. Helm. Mr. Helm made some comment dismissing the incident. On January 20, either a minimum of eight days after the incident or up to five weeks after the incident, Mr. Helm resurrected the incident and cited the violation of store policy as the basis for discharging Ms. Hiracheta from the employment.

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 employer has presented insufficient evidence to establish a current act of misconduct. The date of the incident is in question. The incident came to the employer's attention on the day it occurred, when Ms. Hiracheta brought the matter to the attention of the assistant manager. Ms. Hiracheta provided the employer with the receipt, which the employer then lost. The employer presumably had the ability to pull up the transaction history on its computer system. The employer had the ability to present testimony from the assistant manager to better establish the date of the incident, but the employer did not present such testimony. The employer had the ability to present testimony through the deli employee present at the time of the incident to better establish that date of the incident, but the employer did not present such testimony. The employer apparently was unable to recall at the time of the initial fact-finding interview the basis for the delay in discharging the claimant. At the time of the appeal hearing, the employer testified that he had the flu and that was the cause of the delay. While that might have been the cause of a few days delay in mid-January, that testimony still was not sufficient to establish the date of the incident or the date that matter first came to the employer's attention. The employer shoulders the burden of proof in a discharge matter and has failed to present sufficient evidence, or sufficiently direct and satisfactory evidence to establish a current act. Because the evidence does not establish a current act, the administrative law judge need not take the further step of deciding whether the conduct in question constituted misconduct in connection with the employment that would disqualify Ms. Hiracheta for unemployment insurance benefits.

Because the evidence fails to establish a current act, the administrative law judge concludes that Ms. Hiracheta was discharged for no disqualifying reason. Accordingly, Ms. Hiracheta is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Hiracheta.

DECISION:

The Agency representative's March 14, 2012, reference 01, decision is reversed. The evidence fails to establish that the discharge was 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/kjw