

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**NICOLE M GALINDO**  
Claimant

**APPEAL NO. 14A-UI-00574-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FAMILY DOLLAR STORES OF IOWA INC**  
Employer

**OC: 07/14/13**  
**Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code Section 96.3(7) – Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the January 10, 2014, reference 03, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits. After due notice was issued, a hearing was held on February 7, 2014. Claimant Nicole Galindo participated. John McBride represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Five into evidence.

**ISSUES:**

Whether Ms. Galindo was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether Ms. Galindo was overpaid benefits.

Whether Ms. Galindo must repay benefits she has received.

Whether the employer's account may be charged for benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Nicole Galindo was employed by Family Dollar Stores of Iowa, Inc., from August 2013 until December 10, 2013, when the employer discharged her for theft of merchandise. On December 10, 2013, John McBride, Area Loss Prevention Manager, was at the employer's Waterloo store to interview employees with regard to high shrinkage, disappearance of merchandise from the employer's inventory. On that day, Mr. McBride interviewed Ms. Galindo. During the interview, Ms. Galindo admitted that she had taken a bag of potato chips and a bag of beef jerky without paying for those items. Ms. Galindo had consumed the chips and had opened the bag of jerky. The incident had occurred before the Thanksgiving holiday and before Ms. Galindo's promotion to assistant manager. The loss to the employer was between \$3.50 and \$5.00. Ms. Galindo agreed to repay the employer \$5.00. At the time Ms. Galindo took the

items without paying, she was aware of the employer's policy regarding employee purchases. Ms. Galindo was aware that she was required to pay for any items prior to consuming them and to have her receipt with the item. At the time Ms. Galindo took the items, she was aware that store policy required that another employee ring up the items for her. At no time prior to the December 10, 2013 interview did Ms. Galindo take any steps to pay for the items she had consumed prior to Thanksgiving. Ms. Galindo is a diabetic and took the items when she was experiencing low blood sugar. Though there was an assistant manager in the store at the time Ms. Galindo took the items, but Ms. Galindo made no attempt to contact the assistant manager to assist with purchase of the items Ms. Galindo took.

Ms. Galindo established an additional claim for unemployment insurance benefits that was effective December 8, 2013 and received \$4,143.00 in benefits for the period of December 8, 2013 through February 8, 2014.

The employer participated in the fact-finding interview that led to the January 10, 2014 decision that allowed benefits. Store Manager Sabrina Grill provided a statement on behalf of the employer at the fact-finding interview.

#### **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 evidence in the record establishes misconduct in connection with the employment based on employee theft of the employer's merchandise. Though the actual dollar amount in question was small, the conduct indicated a willful and wanton disregard of the employer's interest. Any merchandise that Ms. Galindo came in contact with during the course of the employment was merchandise that she held in trust for the employer. The merchandise belonged to the employer and did not belong to Ms. Galindo. Ms. Galindo fully understood that at the time she took the items without paying for them. Ms. Galindo also understood the employer's employee purchase policy and made no attempt to pay for the items at the time she took them or at any later point until the employer raised the matter on December 10, 2013. Ms. Galindo's conduct involved a small financial loss to the employer. The conduct also undermined the employer's ability to trust Ms. Galindo. Given the nature of the employment, it was essential that the employer be able to trust Ms. Galindo.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Galindo was discharged for misconduct. Accordingly, Ms. Galindo is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits. As of February 7, 2014, the overpayment amount

was \$4,143.00 for the period of December 8, 2013 through February 8, 2014. Because the employer participated in the fact-finding interview, Ms. Galindo is required to repay the overpayment and the employer will not be charged for benefits already paid or for future benefits paid to Ms. Galindo.

**DECISION:**

The Agency representative's January 10, 2014, reference 03, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged. The claimant is overpaid \$4,143.00 for the period of December 8, 2013 through February 8, 2014. The claimant must repay that amount.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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