

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSH R BREINER
Claimant

APPEAL NO. 09A-UI-03317-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**BDR REALTY COMPANY LLC
PHILLIPS 66 C-STORES**
Employer

**Original Claim: 01/25/09
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Josh Breiner filed a timely appeal from the February 23, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 25, 2009. Mr. Breiner participated and presented additional testimony through Rachel Maier. Darwin Harrington, member owner, represented the employer and presented additional testimony through Doddie Gremmel, Store Manager. Exhibits One, Two, and Three 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: Josh Breiner was employed by Phillips 66 C-Stores as a full-time cashier/deli employee from September 8, 2008 until January 20, 2009, when Store Manager Doddie Gremmel and member owner Darwin Harrington discharged him for selling alcohol to a person under the legal age to purchase it. Ms. Gremmel was Mr. Breiner's immediate supervisor.

The incident that prompted the discharge occurred on January 19, 2009. A 20-year-old female customer approached the cash register to purchase beer. The cash register prompted Mr. Breiner to check the customer's ID. Mr. Breiner requested the customer's photo ID. Mr. Breiner reviewed the photo ID. Mr. Breiner compared the birth date on the photo ID with the birth date that appeared on the cash register indicated as the date on or before which a person would need to have been born to legally purchase alcohol. Mr. Breiner erroneously concluded that the female customer was of legal age to purchase alcohol. Mr. Breiner then sold the alcohol to the 20-year-old female. Shortly thereafter, a law enforcement officer entered the store and issued Mr. Breiner a citation for selling alcohol to a person under the legal age.

Mr. Breiner promptly reported the incident to Store Manager Doddie Gremmel. Mr. Breiner knew that the employer's policy regarding sale of alcohol to persons under the legal age called for discharge of any employee who violated the policy. Ms. Gremmel told Mr. Breiner that she would talk to owner member Darwin Harrington and let Mr. Breiner know the next morning whether he was

discharged from the employment. Ms. Gremmel went to the store the next morning and reviewed surveillance video that indicated Mr. Breiner had in fact ID'ed the under-aged female customer. The employer concluded that it could not deviate from its established policy and notified Mr. Breiner that he was discharged from the employment.

The employer had conducted a staff meeting on January 8, 2009 to alert employees to ongoing law enforcement stings concern sale of alcohol to under-aged persons. During the meeting, the employer had stressed the importance of following all appropriate steps to ascertain whether a customer wishing to purchase alcohol was of legal age to purchase the alcohol. The cash register contained a prompt with the date on or before which a person would have to have been born to be 21 years old and able under the law to legally purchase alcohol. Next to the cash register was a calendar that contained similar information designed to assist the cashier in such transactions. Mr. Breiner had been present at the January 8 meeting.

At the beginning of Mr. Breiner's employment, the employer had Mr. Breiner sign his acknowledgement of the employer's work rules including those pertaining to sale of alcohol to persons under the legal age. Mr. Breiner did not get his own copy of the handbook, but had access to a copy that was kept on the counter.

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. Breiner was careless and/or negligent in failing to accurately determine whether the female customer was of legal age to purchase alcohol. However, the evidence does not indicate that Mr. Breiner knowingly violated the employer's policy or the law. A single incident of ordinary negligence would not constitute misconduct and, therefore, would not disqualify Mr. Breiner for unemployment insurance benefits. See 871 IAC 24.32(1)(a).

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

DECISION:

The Agency representative's February 23, 2009, reference 01, decision is reversed. 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/kjw