

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARCENE D DANIEL
Claimant

APPEAL NO. 15A-UI-08880-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SHELLSBURG GROCERY
Employer

OC: 06/14/15
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Marcene Daniel filed a timely appeal from the July 28, 2015, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Ms. Daniel had been discharged on June 12, 2015 for misconduct in connection with the employment. Ms. Daniel requested an in-person hearing. After due notice was issued, an in-person hearing was held at the Cedar Rapids Workforce Development Center on December 7, 2015. Ms. Daniel participated and presented additional testimony through Marilyn Heaverlo. Roy Fish represented the employer. Exhibits One through Five and A were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Roy Fish owns and operates Shellsburg Grocery, a small grocery store located in Shellsburg. Marcene Daniel was employed at Shellsburg Grocery as a part-time cashier/clerk from fall 2014 until June 12, 2015, when Mr. Fish discharged her from the employment. The conduct that triggered the discharge occurred on June 10 and came to Mr. Fish's attention the next morning. On the evening of June 10, Ms. Daniel was scheduled to work until 8:00 p.m. Ms. Daniel was one of two clerks working at the store that evening. At 7:33 p.m., Ms. Daniel rang up several grocery items for herself. The employer's policies did not prohibit employees from ringing up their own purchases. Ms. Daniel rang up ten items in total. Ms. Daniel immediately voided five of the items. Ms. Daniel voided one of the items, a container of mustard, to reflect a buy-one-get-one vendor coupon. Ms. Daniel left the store with groceries at the end of her shift. The irregularities attending the transaction came to the attention of Mr. Fish on the morning of June 11, 2015, when he reviewed the June 10, 2015 transaction records. Mr. Fish also reviewed sales reports that identified items, and the number of those items, sold on June 10, 2015.

When Ms. Daniel arrived for work on June 12, 2015, Mr. Fish met with her to discuss the irregularities attending the transaction in question. Ms. Daniel provided an explanation that Mr. Fish found implausible. Ms. Daniel asserted that as she had been ringing up her own items a customer had started scanning additional items on her register. Ms. Daniel asserted that she had voided the customer's items from the transaction and had then generated a separate transaction that reflected sale of the four voided items to the customer. Mr. Fish had reviewed the sales records for the day and knew that only one of each of the items had been sold on June 10 and that the sale had taken place at 4:39 p.m. None of the voided items had been sold to a customer at or after 7:33 p.m. Mr. Fish notified Ms. Daniel that she was being discharged from the employment based on theft and based on concerns that she had previously consumed alcohol at work. When Ms. Daniel worked, she would bring with her a Snapple bottle that she would fill with liquid. About a month before the discharge, Ms. Daniel had left the bottle at work and Mr. Fish had discovered the bottle in the sink. Mr. Fish smelled the bottle and concluded that it smelled of vodka. Mr. Fish did not address the incident with Ms. Daniel prior to June 12, 2015. One of the items, amongst the items that Ms. Daniel had purchased, and paid for, as part of the June 10 transaction was a 1.7 liter bottle of vodka.

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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 in the record establishes that Ms. Daniel intentionally manipulated the employer's cash register system on June 10, 2015 to commit theft from the employer. Ms. Daniel rang up ten items. Ms. Daniel scanned all ten items to make it look like she intended to pay for all of her purchase. She immediately voided four of the items to avoid paying for those items and to steal from the employer. When confronted, Ms. Daniel provided the employer with an implausible explanation of what had occurred. The employer recognized the explanation as implausible. The employer knew, based on review of itemized sales reports for June 10, 2015 that Ms. Daniel's explanation was false and that, contrary to Ms. Daniel's assertion, no customer had purchased the items following the transaction that contained the multiple voids. The administrative law judges notes that the employer provided a clear, simple, logical explanation for how the employer determined that Ms. Daniel had manipulated the cash register record to commit theft and how the employer determined that her explanation did not hold water. At the appeal hearing, Ms. Daniel characterized the questionable transaction as a mishap that she immediately corrected through an additional transaction and sale to a customer. The employer's sales records for June 10, 2015 squarely refuted that assertion. There was no subsequently sale to a customer. The readily apparent falsehood contained in Ms. Daniel's assertion that there was an additional sale of the items calls in question Ms. Daniel's credibility generally. Like the employer, the administrative law judge finds Ms. Daniel's explanation of her conduct surrounding the transaction highly implausible and false. Ms. Daniel's conduct in connection with the June 10 voids demonstrated a willful and wanton disregard of the employer's interests. Ms. Daniel was employed to assist the employer in generating revenue and to safeguard the employer's inventory. Ms. Daniel's conduct was contrary to both duties and violated the trust the employer had placed in her.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Daniel was discharged for misconduct. Accordingly, Ms. Daniel 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 employer's account shall not be charged for benefits.

The evidence in the record failed to prove, by a preponderance of the evidence, that Ms. Daniel had consumed alcohol at work. The alleged incident occurred a month before the discharge. The employer did not address the matter with Ms. Daniel at the time of the alleged incident or until the discharge date.

DECISION:

The July 28, 2015, reference 01, decision is affirmed. 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 shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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