

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

KELLY L BENNETT
Claimant

APPEAL NO. 18A-UI-11240-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KWIK TRIP INC
Employer

OC: 10/21/18
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Administrative Code rule 871-24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

Kelly Bennett filed a timely appeal from the November 6, 2018, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Bennett was discharged on October 13, 2018 for theft of company property. After due notice was issued, a hearing was held on December 3, 2018. Ms. Bennett participated. Kathy Laumer represented the employer. Department Exhibits D-1, D-5, D-6 and D-7 were received into evidence.

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: Kelly Bennett was employed by Kwik Trip, Inc. as a full-time Bake Shop Co-worker (kitchen clerk) from 2016 until October 13, 2018, when Kathy Laumer, Store Leader (store manager), discharged her from the employment. Gina Morgan, Food Service Leader (kitchen supervisor) was Ms. Bennett's immediate supervisor. The incident that triggered the discharge occurred on September 5, 2018. The employer asserts that Ms. Bennett obtained food that day without paying an extra \$1.50 due for extra items she had the kitchen staff add to her sandwich order. The conduct came to Ms. Morgan's attention on the day of the incident. Ms. Morgan handed Ms. Bennett the sandwich in question once it was prepared. Ms. Morgan wrote a note and placed it in a folder for Ms. Laumer to review later as part of the employer's monthly review of surveillance records in connection with flagged incidents. The employer did not review the surveillance record or take additional action on the matter until October 2018. The employer waited until October 10, 2018 to discuss the September 5, 2018 incident with Ms. Bennett. The employer discharged Ms. Bennett three days later.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

The employer's discharge of the claimant was not based on a current act. The conduct that triggered the employer's investigation and the discharge occurred on September 5, 2018. The weight of the evidence establishes that the supervisor became aware of the conduct at the time it occurred. The employer took no additional action on the matter until a month later. The employer did not discuss the matter with the claimant until more than a month after the incident occurred and came to the kitchen supervisor's attention. The employer's delay was unreasonable. Because the discharge was not based on a current act, the administrative law judge need not consider whether the conduct in question involved misconduct in connection with the employment. Because the discharge was not based on a current act, the claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The November 6, 2018, reference 01, decision is reversed. The October 13, 2018 discharge was not based on a current act. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs