IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MICHELLE GILLEN
Claimant

DOLGENCORP INC
DOLLAR GEN'L
Employer

APPEAL NO. 07A-UI-00456-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/10/06 R: 03
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Dollar General filed a timely appeal from the January 4, 2007 reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 29, 2007. Claimant Michelle Gillen participated. District manager Terry (T.J.) Heller represented the employer. The administrative law judge took official notice of Agency records regarding benefits disbursed to the claimant.

ISSUE:

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

Whether the conduct that prompted the discharge was the "current act."

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Michelle Gillen was employed by Dollar General is a "third key holder" until December 13, 2006, when Asset Protection Officer Rick Rice and District Manager Terry (T.J.) Heller discharged her for alleged theft of merchandise. Ms. Gillen had commenced her employment with Dollar General on July 16, 2005, as a part-time employee, but was a full-time employee at the time of the discharge. Up until the summer of 2006, Ms. Gillen's immediate supervisor had been Store Manager Peter Roers. Mr. Roers quit his employment with Dollar General to pursue other employment. During Mr. Roers' tenure, it was his practice to occasionally instruct employees, including Ms. Gillen, to help themselves to a soda at times when the staff was working unusually early hours or late hours. In other words, Mr. Roers, as the supervisor, gave the employee's permission to drink a soda at the employer's expense. Over the course of her employment, Ms. Gillen drank approximately ten such sodas. The total retail value of the sodas was approximately $11.00.

On December 13, 2006, Asset Protection Officer Rick Rice went to the Ottumwa store to investigate alleged cash shortages. Mr. Rice interviewed Ms. Gillen. Ms. Gillen admitted to consuming the sodas as outlined above. Mr. Rice asked Ms. Gillen to pay for the sodas and Ms. Gillen did so. Mr. Rice dictated a statement for Ms. Gillen to write out. Ms. Gillen copied the statement and signed it. Mr. Heller then discharged Ms. Gillen from the employment.

Despite Mr. Roers practice of giving away soda to employees, the employer had a formal policy that required employees to pay for all merchandise before they consumed it.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Gillen was discharged for misconduct in connection with the employment. It does not.

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 fails to establish misconduct on the part of Ms. Gillen. The evidence indicates that Ms. Gillen reasonably relied upon the permission granted by Mr. Roers to drink an occasional soda at the employer's expense while Ms. Gillen was working early hours or late hours in furtherance of the employer's interests. Even if consuming free beverages had amounted to misconduct, it would not rise to the level of substantial misconduct necessary to disqualify Ms. Gillen for unemployment insurance benefits. In addition, the evidence indicates that Ms. Gillen's immediate supervisor was at all times aware of the conduct and that the most recent such instance occurred during the summer of 2006, at least a few months prior to the discharge. Accordingly, the conduct at issue would no longer have constituted a current act on December 13, when the employer notified Ms. Gillen that the conduct subjected her to discharge from the employment. See 871 IAC 24.32(8).

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

DECISION:

The Agency representative's January 4, 2007 reference 01, decision is affirmed. 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw