

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANIELLE P FULTON
Claimant

APPEAL NO. 11A-UI-07456-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**CASEY'S MARKETING COMPANY
CASEY'S GENERAL STORES**
Employer

**OC: 05/01/11
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 26, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 1, 2011. Claimant participated. Ron Niermeyer, store manager, represented the employer. Exhibits One and Three through Five 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: Danielle Fulton was employed by Casey's as a full-time associate from 2008 until May 5, 2011, when Blake Homewood, area supervisor, discharged her from the employment. Ms. Fulton was the clerk on duty on May 4, 2011, when an unidentified adult male obtained a Casey's fuel card and used it without authorization to obtain gas at the store where Ms. Fulton worked and at several other Casey's locations. The total value of the theft was \$630.00. The Casey's store kept the fuel cards and a log book next to the cash register. These items were there to be used by employees of companies Casey's had approved to just have their employees sign the log book for the amount of fuel obtained to gain access to the company's fuel card and get fuel. The Casey's clerk on duty was supposed to monitor and facilitate this process. The unidentified man who came into Ms. Fulton's store on May 4 acted like he was a regular at the fuel card/log book transactions. He grabbed the log book from the counter, obtained a fuel card, pumped gas, and then never returned.

The employer suspected Ms. Fulton might have had some intentional involvement in the matter. When the employer reviewed surveillance video, the employer observed Ms. Fulton on her cell phone shortly before the man entered the store. When interviewed, Ms. Fulton denied knowing the perpetrator of the theft. The employer had no evidence to indicate that Ms. Fulton was involved in the theft. The employer turned the matter over to law enforcement. The employer's

decision to discharge Ms. Fulton from the employment was based in large part on the amount of damage done to the employer through the theft.

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).

Like the employer, the administrative law judge is unable to find sufficient evidence in the hearing record to indicate that Ms. Fulton was knowingly involved in the May 4 theft. There is, however, sufficient evidence to establish negligence on Ms. Fulton's part for failing to monitor and appropriately interact with the man in question. Ms. Fulton was there, in part, to safeguard the employer's property. In letting the man in question take control of the transaction just because he acted like he knew what he was doing, Ms. Fulton abdicated her responsibility to the employer. Despite the size of the loss to the employer, this single incident of negligence is insufficient under the law to establish misconduct in connection with the employment that would disqualify Ms. Fulton for unemployment insurance benefits. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Fulton was discharged for no disqualifying reason. Accordingly, Ms. Fulton is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Fulton.

DECISION:

The Agency representative's May 26, 2011, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw