

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BECKY J SCHABEN
Claimant

APPEAL NO. 12A-UI-03049-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TAYLOR OIL CO INC
Employer

OC: 02/12/12
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Becky Schaben filed a timely appeal from the March 23, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 19, 2012. Ms. Schaben participated. Jeff Ellis, Operations Supervisor, represented the employer. Employer Exhibits A through L 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: The employer operates multiple convenience stores. Becky Schaben was employed by Taylor Oil Company as the full-time Store Manager at the employer's Harlan convenience store from 2002 until February 14, 2012, when Brad Taylor, President, discharged her from the employment. Mr. Taylor was Ms. Schaben's immediate supervisor. Ms. Schaben was responsible for all aspects of the Harlan store's operations. These included serving customers, daily documentation, bank deposits, interacting with vendors, supervising and scheduling three employees, and safeguarding inventory.

The final incident that triggered the discharge was a periodic inventory of merchandise completed on February 9, 2012. The inventory check revealed a \$6,648.09 inventory shortage since the last inventory check had been performed on December 6, 2011. Sales during the same period had been \$15,427.45. While the employed accepted the industry standard of two percent inventory shrinkage, the inventory shortage noted on February 9, 2012 was 10 percent.

The dramatic loss of inventory the employer discovered on February 9, 2012 occurred in the context of recent financial irregularities perpetrated by Ms. Schaben. These included multiple bogus cigarette discounts entered on the cash register between January 30 and February 9, 2012 to manipulate revenue records. These included voided transactions entered on the cash register to manipulate revenue records. The financial irregularities also included Ms. Schaben's

failure to complete a shift report for the shift she worked on January 25, 2012 and her later submission of a bogus shift report for that day that included alleged safe drops.

The final matters that factored in the discharge followed earlier problem inventories, as well as ongoing theft from the employer perpetrated by Ms. Schaben. From at least the middle of 2010 until the middle of 2011, Ms. Schaben routinely took hundreds of dollars from the employer's change bag and converted it to her personal use. Ms. Schaben manipulated the timing of bank deposits to cover her thefts from the employer. In June 2011, after the accumulated thefts had outgrown Ms. Schaben's ability to hide them, Ms. Schaben brought her conduct to the attention of the employer. At that time, Ms. Schaben admitted to stealing from the employer for years. The employer nonetheless continued her employment. In August 2011, an inventory check revealed a \$5,990.05 inventory loss since the most recent inventory check had occurred in June. In September 2011, an inventory check revealed a \$2,584.78 inventory shortage since the August inventory audit. In November 2011, an inventory check revealed a \$2,091.28 inventory shortage since the September inventory audit. In December 2011, an inventory check revealed a \$1,993.59 inventory shortage since the November inventory audit.

Ms. Schaben had appropriate training to perform her store manager duties.

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 Ms. Schaben's theft from the employer did not end in June 2011 with her admission to the employer. The weight of the evidence indicates that Ms. Schaben continued thereafter to manipulate cash register transaction records and other financial documentation to perpetrate and conceal theft from the employer. Over and above theft from the employer, Ms. Schaben's ongoing failure to safeguard the employer's inventory indicates additional willful and wanton disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Schaben was discharged for misconduct. Accordingly, Ms. Schaben 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 paid to Ms. Schaben.

DECISION:

The Agency representative's March 23, 2012, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs