

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LURA L SHELBY**

Claimant

**APPEAL NO. 14A-UI-02393-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY**

Employer

**OC: 02/02/14**

**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

871 IAC 24.32(8) – Discharge for Current Act of Misconduct

**STATEMENT OF THE CASE:**

Casey's Marketing Company filed a timely appeal from a representative's decision dated February 19, 2014, reference 01, which held claimant eligible to receive unemployment insurance benefits finding that the claimant's dismissal from work was not for a current act of misconduct. After due notice was provided, a telephone hearing was held on March 26, 2014. Claimant participated. The employer participated by Ms. Lisha Webber, Hearing Representative, and witnesses: Stephanie Mills, Store Manager, and Lisa Archer, Assistant Manager. Employer's Exhibits A, B, C, D, E, F and G were received into evidence.

**ISSUE:**

The issue is whether the claimant was discharged for a current act of misconduct.

**FINDINGS OF FACT:**

Having considered the evidence in the record, the administrative law judge finds: Lura Shelby began employment with Casey's Marketing Company on August 28, 2012. Ms. Shelby was employed as a full-time store employee and was paid by the hour. Her immediate supervisor was Stephanie Mills, the store manager. Ms. Shelby was discharged on February 1, 2014 for an incident that had taken place on January 19, 2014.

On January 18, 2014, Ms. Shelby indicated to another store employee that she intended to purchase three "teddy bears" that were for sale at the store. Claimant did not purchase the teddy bears that evening but placed them in the manager's office with the stated intention of purchasing them later. On January 20, 2014, an employee noticed that the teddy bears were gone from the office area and brought the matter to the attention of the store manager. Ms. Mills questioned the claimant about whether she had purchased the teddy bears and the claimant stated that she had. It was the claimant's belief that she had purchased them on the night of January 18. A subsequent investigation and review of company security tapes and cash register records verified to the store manager that Ms. Shelby had not purchased the three

teddy bears that she had subsequently removed from the facility and Ms. Shelby was again confronted on January 30, 2014.

On January 30, 2014 when confronted by evidence that the bears had not been paid for, Ms. Shelby conceded that she “must have forgotten when she took them on January 19.” The claimant at that time offered to pay for the bears. The claimant’s offer was accepted by the store manager and she was instructed to keep the matter confidential and the claimant remitted the value of the three bears to her employer the following day, January 31, 2014 as agreed. Based upon statements made to her and the restitution that she had provided as agreed, Ms. Shelby believed that the matter was closed. Although the claimant engaged in no further acts of misconduct, the employer made a decision to terminate the claimant effective Saturday, February 1, 2014.

### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the claimant was discharged for a current act of misconduct. She was 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 insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not

necessarily be serious enough to warrant the denial of unemployment insurance 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. of Appeals 1992).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based on a current act. See 871 IAC 24.32(8).

In this matter the employer became reasonably concerned based upon allegations that the claimant had removed three teddy bears from the premises on or about January 18, 2014 without paying for them. The claimant was questioned and remembered paying for them, however, a review of company records and surveillance tapes showed that the claimant had not.

On January 30, 2014, the store manager had concluded the claimant had taken company merchandise in violation of company policy by not paying for them or following company receipt procedures for employee purchases. On that date the store manager elected not to discharge Ms. Shelby for her previous acts but to allow her to continue as an employee providing the claimant made restitution for the three stuffed toys with an approximate value of \$21.00. Based upon the statement the matter should be kept confidential, Ms. Shelby reasonably believed that her employment with the company would continue unless she engaged in further acts of misconduct. Ms. Shelby complied with the agreement and made restitution as promised. Two days later, on February 1, 2014, the employer elected to discharge Ms. Shelby for her prior act.

The evidence in the record does not establish that the employer was continuing to investigate or that the employer was uncertain about what the claimant's conduct was when the store manager met with Ms. Shelby on January 30, 2014. The employer was certain that the claimant had violated serious company policies but the employer did not elect to discharge Ms. Shelby at that time. After the claimant had made the agreed restitution, the employer elected to discharge the claimant two days later. There were no intervening acts of misconduct on the part of the claimant.

Although the administrative law judge clearly does not condone or sanction the misappropriation of company property or an employee's failure to follow cash handling or receipt policies, the evidence in this record establishes that the matter of the claimant's taking company property on January 18, 2014 had been resolved on January 30, 2014 and the claimant had not been discharged.

While the employer's later decision to terminate the claimant may have been a sound decision from a management viewpoint, the evidence in the record does not establish any intervening misconduct on the part of the claimant. Based upon the unique circumstances of this case, the administrative law judge concludes that the claimant was not discharged for a current act of misconduct on February 1, 2014 and for that reason alone the employer has not sustained its burden of proof in establishing disqualifying job misconduct.

**DECISION:**

The representative's decision dated February 19, 2014, reference 01, is affirmed. The claimant was not discharged for a current act of misconduct. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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