

alleged misconduct. Store Director Ric Anderson subsequently discharged Ms. Kramer on August 22, 2005.

The final incident that prompted the discharge came to the employer's attention on August 15, 2005. The employer had recently installed a software program onto its computer system that allowed managers to audit cash register transactions. On August 15, Store Operations Manager Kyle Thornsborough audited Ms. Kramer's cash register transactions from August 1 through August 11. Mr. Thornsborough audited other cashiers' register transactions for the same period. Mr. Thornsborough concluded that Ms. Kramer had violated store policy by redeeming expired and/or invalid vendor coupons and by issuing unauthorized "gas busters" coupons.

The "gas busters" coupons were part of an in-store promotion that began in February 2005. A customer would purchase qualifying grocery items and would receive a coupon for a four, eight, 12, 16, or 20 cents discount per gallon of gas purchased at the gas station operated by Hy-Vee. The amount of the discount was determined by the number of qualifying items purchased by the customer, with each item increasing the discount by four cents. Customers could receive more than one "gas buster" coupon in a single order. However, the registers were programmed to print only one coupon per order, so the cashier or a manager would have to override the program to generate one or more additional "gas busters" coupons. The audit of Ms. Kramer's cash register transactions revealed that she issued a significantly greater number of gas buster coupons than the other cashiers. The audit also revealed transactions on Ms. Kramer's register wherein the coupons appeared to be issued without a qualifying purchase or wherein a greater discount was given than the discount warranted by the number of qualifying items purchased. As a result of the audit, Mr. Thornsborough concluded Ms. Kramer had intentionally deviated from the parameters of the "gas busters" promotion and issued unauthorized coupons and discounts. On August 16, Mr. Thornsborough confronted Ms. Kramer about the questioned transactions and concluded that Ms. Kramer was not able to provide a satisfactory explanation of the transactions. Mr. Thornsborough suspended Ms. Kramer until Store Director Ric Anderson's return from vacation. At the time Mr. Thornsborough suspended Ms. Kramer, he did not advise Ms. Kramer that her behavior in connection with the "gas busters" coupons subjected her to possible discharge. Ms. Kramer did not learn until August 22, the date on which Store Director Ric Anderson discharged her, that her conduct in connection with the "gas busters" coupons subjected her to possible discharge.

As a result of the audit on August 15, Mr. Thornsborough also concluded that Ms. Kramer had accepted expired and/or otherwise invalid vendor coupons. One of the transactions that caught Mr. Thornsborough's attention took place at 8:03 a.m. on August 9. The record of the transaction reflected a total discount of \$7.05 and reflected six entries on the receipt for unspecified vendor coupons. Two of the entries concerned three valid vendor coupons for butter. Ms. Kramer had attempted to scan these coupons, but the cash register's computer rejected them as invalid. The coupons were set to expire on the date they were redeemed. When the register rejected the coupons, Ms. Kramer entered the appropriate discount as a non-specified vendor coupon. If the computer had accepted the coupons as valid, the receipt would have displayed information identifying the product to which the coupon pertained. Mr. Thornsborough attempted to scan the three vendor coupons for butter and they were again rejected. The employer asserts that other coupons involved in this transaction, and perhaps others, were expired or otherwise invalid. However, the employer did not make the questionable coupons available for the administrative law judge to review in connection with the hearing.

The employer asserts that Ms. Kramer did not provide an appropriate explanation of her conduct with regard to the vendor coupons or the “gas busters” coupons at the time of her suspension or at the time of her discharge. Ms. Kramer explains that she was dumbfounded when she was accused of wrongdoing, did not review in depth the questioned transactions at the time she was confronted with the audit, and did not at that time specifically remember the questioned transactions. Ms. Kramer asserts that the cash register entries regarding the “gas busters” coupons can be explained by a few different scenarios. Ms. Kramer asserts that in several instances she forgot to provide a customer with the appropriate coupon before she closed her cash register drawer and would then need to generate a separate transaction just for the issuance of the coupon. Ms. Kramer asserts, and the employer agrees, that the system would need to be overridden to issue a second or subsequent coupon on a single grocery order. Ms. Kramer asserts that she would print off the coupons in response to requests from other cashiers who needed “gas busters” coupons for customers they were serving. Ms. Kramer asserts she would print the coupons for customers who claimed to have come in over the weekend and not received their coupons. Finally, Ms. Kramer asserts that Shift Supervisor Bob Lewis directed her to print off coupons for “good customers” without a qualifying purchase. Mr. Lewis continues to be employed by Hy-Vee, but did not testify at the hearing. Since Ms. Kramer’s discharge, the store management has imposed the requirement that a manager be summoned to conduct the system override where more than one “gas busters” coupon is issued in connection with an order.

At the time Ms. Kramer commenced her employment, she executed written acknowledgements of Hy-Vee’s policy regarding UPC codes, bottle caps, “Catalina coupons” and any other redemption for cash or merchandise premised on product purchase. At the time Hy-Vee initiated the “gas busters” promotion, the management expected that shift supervisors would review the promotion with cashiers. It does not appear that any detailed parameters were shared with Ms. Kramer.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Kramer was discharged for misconduct in connection with his employment.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since the claimant was discharged, 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 her 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). The date on which the employee was informed her conduct provided grounds for dismissal is to be considered in determining whether the misconduct was a past or current act. See Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988)(Lapse of four days from final act until the claimant was notified that his conduct was grounds for dismissal, did not make final act a "past act").

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).

There are at least two significant flaws or shortcomings in the evidence presented by the employer. The first relates to whether the final incident(s) of misconduct constituted a "current act." Though Mr. Thornsborough conducted the audit on August 15, Ms. Kramer did not learn until August 22, one week later, that the questioned transactions subjected her to possible discharge. The administrative law judge concludes that the most recent offending behavior no longer constituted a "current act" of misconduct on August 22.

The second significant shortcoming in the evidence presented by the employer concerns the quality of the evidence presented by the employer. Shift Supervisor Bob Lewis was apparently the management member who had the greatest amount of contact with Ms. Kramer.

Ms. Kramer testified that Mr. Lewis authorized at least some of the transactions and may have provided directions to Ms. Kramer that greatly relaxed the parameters of the "gas busters" promotion. Store Director Ric Anderson testified that he interviewed Mr. Lewis in connection with the decision to discharge Ms. Kramer. Nonetheless, the employer failed to present testimony from Mr. Lewis. In addition, the employer failed to produce sufficient documentary evidence to corroborate the allegation of misconduct.

The weight of the evidence in the record fails to establish that Ms. Kramer was discharged for misconduct. Accordingly, Ms. Kramer is eligible for benefits, provided she is otherwise eligible. The employer's account may be assessed for benefits paid to Ms. Kramer.

DECISION:

The Agency representative's decision dated September 12, 2005, reference 01, is reversed. 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 assessed for benefits paid to the claimant.

jt/kjw