

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DEBORAH ELSBERRY**

Claimant

**APPEAL NO. 18A-UI-02912-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY**

Employer

**OC: 02/04/18**

**Claimant: Respondent (2)**

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

Iowa Code Section 96.3(7) - Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the February 22, 2018, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on February 7, 2018, for no disqualifying reason. After due notice was issued, a hearing was held on March 29, 2018. Claimant Deborah Elsberry participated. Rosalind Gustafson represented the employer and presented additional testimony through Amber Niles and Anthony "AJ" Patterson. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 6 and 8 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

**ISSUES:**

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

Whether the claimant was overpaid unemployment insurance benefits.

Whether the claimant is required to repay overpaid benefits.

Whether the employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Deborah Elsberry was employed by Casey's Marketing Company as a full-time cook/kitchen helper at the Casey's store in Dayton from 2011 until February 7, 2018, when the employer discharged her for violating the employer's food handling and food safety policies. Ms. Elsberry's work hours were usually 10:00 a.m. to 4:00 p.m. One day per week, Ms. Elsberry would work 9:00 a.m. to

2:00 p.m. Ms. Elsberry's essential duties included stocking the food warmers so that customers could purchase the prepared food. The employer's written policies required that food items not sold within an hour of being placed in the food warmer be removed from the food warmer and discarded. There were multiple reasons for this policy. The policy ensured that customers were presented with fresh and safe food. The policy reduced the employer's risk of liability by preventing the sale of prepared food that had become unsafe due to a decrease in internal temperature. In practice, the employer made one exception to this "wasting" rule. In practice, the employer would refrigerate the chicken tenders removed from the warmer and later use them for chicken wraps. Ms. Elsberry received appropriate training with regard to the employer's food handling and food safety policies, including those policies related to stocking and maintaining the food warmer. Ms. Elsberry was fully aware of the employer's food handling and food safety policies, including the policy and protocol related to food warmer items. Ms. Elsberry was fully capable of completing her duties in a manner consistent with the employer's policies.

The final incident that triggered the employer's decision to discharge Ms. Elsberry from the employment on February 7, 2018 occurred on that day, when Anthony "AJ" Patterson reviewed video surveillance that showed Ms. Elsberry violating the food warmer protocol. Ms. Elsberry removed a "hot cup" of potato wedges that had been in the warmer for 65 to 70 minutes. Ms. Elsberry walked around a counter and transferred the potato wedges from the "hot cup" to a food "boat." Ms. Elsberry topped the wedges with cheese sauce and bacon bits. Ms. Elsberry then returned the modified food item to the food warmer for sale to customers. Mr. Patterson conferred with Ms. Gustafson and then notified Ms. Elsberry that she was discharged from the employment. In January 2016, Ms. Gustafson had issued a written reprimand to Ms. Elsberry for the exact same violation of food warmer policy. The reprimand included a two-day suspension and a warning that Ms. Elsberry's employment would be terminated if she did not follow policies and procedures.

In November 2016, Ms. Gustafson had issued an additional written warning to Ms. Elsberry in response to Ms. Elsberry's failure to monitor how long food items had been in the food warmer.

On December 7, 2017, Ms. Gustafson issued a written reprimand to Ms. Elsberry in response to Ms. Elsberry eating food left on a cutting board after Ms. Elsberry cut a pizza and in response to Ms. Elsberry getting into a yelling match with a customer who was upset by Ms. Elsberry's unsanitary "grazing" behavior. In connection with the written reprimand, Ms. Gustafson warned Ms. Elsberry that the next violation of company policy would result in termination of the employment.

Ms. Elsberry established a claim for unemployment insurance benefits that Workforce Development deemed effective February 4, 2018. Ms. Elsberry has received \$1,476.00 in benefits for the six-week period of February 11, 2018 through March 24, 2018. Casey's Marketing Company is the sole base period employer.

On February 21, 2018, a Workforce Development claims deputy held a fact-finding interview that addressed Ms. Elsberry's separation from Casey's Marketing Company. Phyllis Farrell of Equifax represented Casey's at the fact-finding interview. Ms. Farrell provided an oral statement to the deputy and submitted substantial documentation setting forth the particulars of the final incident, the particulars of the prior violations and reprimands, and the applicable policy.

## REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The weight of the evidence in the record establishes a February 7, 2018 discharge for misconduct in connection with the employment. The discharge was based on Ms. Elsberry's repeated violation of the employer's food handling and food safety policies. On February 7, 2018, Ms. Elsberry knowingly and intentionally reused potato wedges in violation of the employer's established policy. Two years earlier, Ms. Elsberry had been reprimanded and suspended for the exact same conduct. In between those two identical policy violations, Ms. Elsberry was reprimanded in November 2016, for failing to monitor food warmer times and was reprimanded in December 2017, for "grazing" in violation of the employer's food handling and food safety policies. Ms. Elsberry's repeated unreasonable violations of the employer's reasonable policies and directives indicated a willful disregard for the employer's interests in providing fresh, safe food to Casey's customers and in preventing the sale of unsafe food that might make a customer sick and expose Casey's to financial liability in connection with the illness.

Because the evidence establishes a discharge for misconduct in connection with the employment, Ms. Elsberry is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Elsberry must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because a base period employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Ms. Elsberry received benefits, but has been denied benefits as a result of this decision. Accordingly, the \$1,476.00 in benefits that Ms. Elsberry received for the six-week period of February 11, 2018 through March 24, 2018, constitutes an overpayment of benefits. Because the employer participated in the fact-finding interview within the meaning of the law, Ms. Elsberry is required to repay the overpaid benefits. The employer's account is relieved of liability for benefits, including liability for benefits already paid to the claimant.

**DECISION:**

The February 22, 2018, reference 01, decision is reversed. The claimant was discharged on February 7, 2018, for misconduct in connection with the employment. 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 amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$1,476.00 in benefits for the six-week period of February 11, 2018 through March 24, 2018. The claimant must repay the overpaid benefits. The employer's account is relieved of liability for benefits, including liability for benefits already paid to the claimant.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/scn