

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHARNISHA S TODD
Claimant

APPEAL NO. 13A-UI-01226-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DOLGENCORP LLC
Employer

OC: 06/17/12
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 24, 2013, reference 02, decision that allowed benefits and that held the employer's account could be charged. After due notice was issued, a hearing was held on March 4, 2013. Claimant Sharnisha Todd participated. Nathan Munley, Store Manager, represented the employer. Exhibit One was 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: Sharnisha Todd was employed by Dollar General as a part-time sales associate at the employer's Waterloo store from 2009 until December 19, 2012, when Rick Rice, Regional Loss Prevention Officer, discharged her from the employment for receiving unauthorized discounts on store merchandise. The employer discharged several other employees the same day for the same reason. The discharge followed Mr. Rice's interview of Ms. Todd on December 19. Mr. Rice was at the store that day investigating violations of the employer's Markdown Cart policies and procedures. Ms. Todd and others had purchased non-Markdown Cart merchandise at the 50 percent Markdown Cart discounted price. At the time Mr. Rice interviewed Ms. Todd on December 19, Ms. Todd provided a written statement indicating that she had received unauthorized discounts. At the time Mr. Rice interviewed Ms. Todd, he questioned her about other employee's receipt of unauthorized discounts. Ms. Todd declined to provide information concerning other employees' conduct. Ms. Todd had received one or more of her unauthorized discounts from the then Assistant Manager Andrea Burt, whom the employer also discharged from the employment.

Prior to the discharge, Store Manager Nathan Munley reviewed video surveillance concerning Ms. Todd's unauthorized uses of the Markdown Cart 50 percent discount. In one such incident, Ms. Todd used the discount to purchase a \$20.00 toy for \$10.00. Ms. Munley saw on the surveillance video that Ms. Todd had collected the toy from several aisles away from the

Markdown Cart merchandise area and had then taken the item to the cash register at the front of the store. Mr. Munley was able to correlate the video surveillance he reviewed with the time-stamped record of the cash register transaction. As the store manager, Mr. Munley reviewed the Markdown Cart merchandise area daily and was fully aware of what items were and were not part of that area. The toy Ms. Todd purchased as part of the particular transaction was not Markdown Cart merchandise.

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 in the record establishes that Ms. Todd did indeed purchase merchandise with an unauthorized discount in violation of the employer's policies. The administrative law judge found Ms. Todd's credibility to be lacking. Ms. Todd had worked at the store for about three years. Utilizing the Markdown Cart policies and procedures were a normal part of her duties as she waited on customers. A reasonable person would expect Ms. Todd to be fully versed in the Markdown Cart policies and procedures. The administrative law judge found not credible Ms. Todd's assertions that the issue, as she understood it to be at the time of the interview and discharge, was whether employees could purchase items from the Markdown Cart. The weight of the evidence indicates that when Ms. Todd wrote her statement indicating she had received unauthorized discounts, she knew what she was admitting to and that it was not merely purchasing items from the Markdown Cart.

The evidence establishes an additional reason to question Ms. Todd's credibility. The weight of the evidence indicates that Ms. Todd intentionally interfered with Mr. Rice's investigation on December 19, by refusing to answer his questions regarding other employees implicated in the giving and receiving of unauthorized discounts. That was Ms. Todd's initial testimony on that matter. Later, Ms. Todd testified that she did not have information concerning other employees. The weight of the evidence indicates that Ms. Todd intentionally withheld information from Mr. Rice during the interview. Ms. Todd's testimony that she told Mr. Rice just to get her firing over with is also telling.

On the other hand, a reasonable person would expect the store manager to be aware of what items were subject to the Markdown Cart discount and what items were not. A reasonable person would also expect the store manager to understand the layout of the store he managed. The administrative law judge found no reason to discount Mr. Munley's testimony regarding the unauthorized discount incident he observed on surveillance.

Ms. Todd's conduct was in willful and wanton disregard of the employer's interests and constituted misconduct in connection with the employment. Ms. Todd is disqualified for unemployment insurance benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she will also have to meet the other eligibility requirements. The employer's account will not be charged.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at

the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

DECISION:

The Agency representative's January 24, 2013, reference 02, decision is reversed. 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 will not be charged.

This matter is remanded to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css