

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALICIA K FLEMMENS

Claimant

APPEAL NO. 12A-UI-11960-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 09/09/12

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Alicia Flemmens filed a timely appeal from the September 25, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 29, 2012. Ms. Flemmens participated. Kelsy Owen, General Manager, represented the employer. Exhibits One, Two, Three, Six and Seven 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: Alicia Flemmens was employed by Casey's as an associate/clerk from December 2011 until September 10, 2012, when Kelsy Owen, General Manager, and Curt Fox, Area Supervisor, discharged her for violating the employee discount policy and the for unauthorized removal of merchandise from the store. Ms. Owen became Ms. Flemmens' immediate supervisor on June 1, 2012, when she became the Store Manager.

On September 7, 2012, Ms. Flemmens inserted herself into a sales transaction started by another employee, Deb Nelson. The customer being served was Ms. Flemmens' son, who was purchasing three submarine sandwiches and some other items. Ms. Nelson had already begun to ring up the purchase when Ms. Flemmens stepped in. Ms. Flemmens backed out of the subtotal screen on the cash register and applied her employee discount three times, once for each submarine sandwich. By doing so, Ms. Flemmens made each of the sandwiches half-price. Rather than charging her son \$5.00 per sandwich, Ms. Flemmens charged her son \$2.50 per sandwich. The loss to the employer as a result of the unauthorized use of the employee discount was \$7.50. Ms. Flemmens completed the transaction with her son. Ms. Flemmens knew at the time she gave her son the discount that her actions were contrary to store policy. Pursuant to the employer's written policy, the employee discount applied only to employees, not to family members. Ms. Flemmens knew that . The written policy also limited use of the discount to a \$3.50 discount per day. The written policy restricted use of the discount to items

the employee was going to consume at the store during the employee's shift. The written policy also indicated that another staff member was supposed to ring up the transaction. Ms. Flemmens had signed for the policy in December 2011 when she started with the employer, but had not read the policy before she signed it.

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 evidence in the record establishes that Ms. Flemmens knowingly violated the employer's employee discount policy when she interfered with a transaction another employee had started so that she could give her son an unauthorized food discount. Ms. Flemmens knowingly and willingly acted contrary to the interests of the employer. The loss to the employer was \$7.50. The administrative law judge finds Ms. Flemmens professed ignorance of other aspects of the employee discount policy not credible. Ms. Flemmens had worked for the employer for eight months, during which time she most likely used the employee discount many times and facilitated her coworkers' use of the discount.

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

DECISION:

The Agency representative's September 25, 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 will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css