

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICHOLAS E YUSTEN
Claimant

APPEAL NO. 14A-UI-06640-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 06/01/14
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 20, 2014, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged for no disqualifying reason. After due notice was issued, a hearing was held on July 18, 2014. Claimant Nicholas Yusten participated. Monica Von Seggem represented the employer and presented additional testimony through Lori Ceselski of Equifax/Talx. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits Two through Eight 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 within the meaning of the law.

ISSUE:

Whether Mr. Yusten 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: Nicholas Yusten was employed by Casey's from September 2013 until June 4, 2014 when Monica Von Seggem, Area Supervisor, discharged him from the employment for improper cash handling. Mr. Yusten's immediate supervisor was Dawn Barkley, Store Manager. Though the employer's written policy required that only one employee operate a cash register drawer assigned to that employee, Ms. Barkley would direct Mr. Yusten to remain logged on to his assigned cash drawer while he was away from the register so that other employees could use the register as well. The final cash register shortage that factored in the discharge occurred on May 30, 2014 when Mr. Yusten's cash register drawer was short \$183.00. Another cash register drawer was over that same day, so that the two drawers resulted in the store having an \$82.77 shortage for the day. The employer reviewed surveillance records, but could not discern the origin of the cash register shortage. The employer does not suspect or believe that Mr. Yusten engaged in theft from the employer.

Though the employer did not reference additional shortages at the time of discharge or prior to the discharge, the employer considered two other instances wherein Mr. Yusten's cash register drawer was short. On May 9, 2014 the drawer assigned to Mr. Yusten was short \$91.63. Another register drawer had approximately a \$30.00 overage. The two drawers together resulted in the store being short \$66.95 for the day. On May 14 Mr. Yusten's assigned drawer was short \$40.45.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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).

The employer has presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish misconduct in connection with the employment. The employer elected not to present testimony from Ms. Barkley, Mr. Yusten's immediate supervisor. Nor did the employer present testimony from anyone else who worked in the Sioux City store to address cash register practices in that store. The employer has presented insufficient evidence to rebut Mr. Yusten's assertion that Ms. Barkley directed Mr. Yusten to leave his cash register available for other employees to use. The weight of the evidence also indicates that the employer had never brought the prior cash register variances to Mr. Yusten's attention at or before the time of discharge. Given the nature of the business, a reasonable person would expect a person operating the cash register to make a mistake from time to time.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Yusten was discharged for no disqualifying reason. Accordingly, Mr. Yusten is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Claims Deputy's June 20, 2014, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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