

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANITA L SPELLER
Claimant

APPEAL NO: 18A-UI-07599-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON PET PRODUCTS INC
Employer

**OC: 06/10/18
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge

STATEMENT OF THE CASE:

Anita Speller, the claimant, filed a timely appeal from a representative's unemployment insurance decision dated July 13, 2018, (reference 01) which denied benefits finding that the claimant was discharged for theft of company product. After due notice was provided, a telephone hearing was held on August 1, 2018. Claimant participated. Although the employer provided a telephone number for a witness, the witness was not available at the telephone number provided. Two messages were left for this witness.

ISSUE:

The issue is whether the claimant was discharged for intentional work-connected misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Anita Speller was employed by Tyson Pet Products, Inc., from May 29, 2014 until June 13, 2018, when she was discharged from employment. Ms. Speller worked as a full-time showcase operator and was paid by the hour. Her immediate supervisor was Jonathan Paulsen.

On June 8, 2018, a company employee reported to management that an empty dog treat bag had fallen out of Ms. Speller's pocket at work. They investigated and found a bag partially filled with company dog treats in the showcase area, and subsequently found that Ms. Speller had moved the dog treats from that area to inside her locker for later removal. After questioning the claimant, the company concluded that it was the claimant's intention to remove the property from the premises later that day. Company policy prohibits the removal of any company product without payment or advanced authorization and those who violate the rule are subject to discharge.

Ms. Speller was asked by another female worker to retrieve some dog foods out of the company "garbage". Ms. Speller believed that defective items that were determined as unsaleable by the company and placed in the garbage were available for company employees to take, as these items had no value to the company.

It is the claimant's position that other employees routinely followed this practice without receiving disciplinary actions or being discharged. Ms. Speller, on a number of occasions in the past, removed items such as plastic pails for her own personal use. Ms. Speller had not been previously warned or reprimanded by the company for this practice.

It is Ms. Speller's additional position that because the items were not removed from the company premises, she had engaged in no unlawful act.

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).

In discharge cases the employer has the burden to prove disqualifying conduct on the part of the claimant. See Iowa Code § 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).

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).

An employer may discharge an employee for any number of reasons, or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it did not meet its burden of proof to establish that the claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. In this matter the claimant participated personally and testified under oath that she was unaware that retrieving a small number of dog treats determined as non-saleable would cause her to be discharged from employment on the first occurrence. The claimant asserted that the employer was aware that she retrieved other discarded items but had not warned her or informed her that it was a violation of policy and could jeopardize her employment. There being no evidence in the record, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing intentional calculated misconduct sufficient to warrant the denial of unemployment insurance benefits. Accordingly, benefits are allowed, provided that the claimant is otherwise eligible.

DECISION:

The representative's unemployment insurance decision dated July 13, 2018, reference 01 is reversed. Claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant meets all the eligibility requirements of Iowa law.

Terry P. Nice
Administrative Law Judge

Decision Dated and Mailed

tn/scn