

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRENDA S BLAKEY**  
Claimant

**APPEAL NO. 10A-UI-07064-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CIGARETTE OUTLET INC**  
Employer

**OC: 04/11/10  
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 May 5, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 29, 2010. Claimant participated. Debra Schnyder, Supervisor, represented the employer. Exhibits One and Two 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: Brenda Blakey was employed by Cigarette Outlet as a part-time clerk at the employer's North Liberty store during two separate periods. The most recent period of employment began in October 2009 and ended on April 13, 2010, when Debra Schnyder, Supervisor, discharged her from the employment. Ms. Schnyder supervises all of the employer's 15 stores and was not Ms. Blakey's immediate supervisor. Store Manager Cassandra Wesley was Ms. Blakey's immediate supervisor.

The final incident that prompted the discharge was the employer's receipt of an e-mail from an Iowa Lottery official who was relaying a complaint that agency had received from a patron who attempted to redeem winning lottery tickets at the North Liberty store. The incident in question took place about a month before the discharge. The employer did not provide the e-mail for the hearing, does not recall what date the e-mail was received, but estimates the e-mail from the Iowa Lottery official was received one week prior to the discharge. At the time of Ms. Blakey's interaction with the patron who complained to the Iowa Lottery, the North Liberty store had just expanded its Iowa Lottery offerings. The patron in question presented a combination of winning tickets that exceeded the amount of cash register money the store had available to pay out winning tickets. Ms. Blakey and Ms. Wesley were both involved in addressing the matter and neither was clear on where they should get the funds to redeem the winning lottery tickets. Ms. Wesley asked the patron to wait while she contacted someone else within the company for

guidance. The patron got upset, said he would present the winning tickets elsewhere, and left the store before Ms. Wesley could get further guidance on how to go about redeeming the tickets. A couple days later, the patron returned to the store and Ms. Blakey apologized for the delay and confusion the patron had earlier endured.

The employer asserts that the discharge was based on other customer complaints. Ms. Blakey had received no written reprimands prior to her date of termination. On that date, Ms. Schnyder presented Ms. Blakey simultaneously with a written reprimand for an alleged overcharge on a credit card and termination based on the Iowa Lottery correspondence. However, the employer witness lacks first-hand, personal knowledge regarding any of the alleged complaints. Ms. Schnyder's knowledge of the alleged complaints, aside from the Iowa Lottery incident, is based on information received from Ms. Wesley. Ms. Wesley is still the manager of the North Liberty store.

### **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 fails to establish misconduct in connection with Ms. Blakey's involvement in the attempt to redeem the Iowa Lottery tickets. The weight of the evidence indicates that Ms. Blakey and Ms. Wesley were presented with a novel situation and did not know how to handle it. At worst, their handling of the matter involved good faith errors in judgment. It did not involve misconduct. Ms. Blakey made no decisions on her own regarding that matter. Ms. Blakey and Ms. Wesley were both motivated by a desire to redeem the ticket in keeping with the employer's interests and took reasonable steps to get guidance from the employer. Ms. Blakey cannot be held responsible for the customer's decision not to wait for resolution. The employer has presented insufficient evidence to establish that Ms. Blakey made any disparaging remarks about the Iowa Lottery products the employer offers. The employer also presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish any other misconduct. The employer allegations of misconduct do not rise above allegations. The employer witness lacked first-hand personal knowledge of the matters in question. The employer had the ability to present testimony through Ms. Wesley, but failed to do so.

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

**DECISION:**

The Agency representative's May 5, 2010, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs