

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

TAHANY GORGY
Claimant

WALMART INC
Employer

APPEAL NO. 19A-UI-10107-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/24/19
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Tahany Gorgy filed a timely appeal from the December 13, 2019, reference 01, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on October 29 for theft of company property. After due notice was issued, a hearing was held on January 16, 2020. Ms. Gorgy participated. Veneissia Jones represented the employer and presented additional testimony through Jonathan Garcia. CTS Language Link Arabic-English interpreters Maryam Hafaz, Aissar Abuhammoudeh and Semir Alzabuy assisted with the hearing.

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: Tahany Gorgy was employed by Walmart, Inc. as a part-time cashier at the Windsor Heights Sam's Club from May 2019 until October 29, 2019, when the employer discharged her for theft of company property. On September 29, October 12, October 13, and twice on October 19, Ms. Gorgy knowingly and intentionally took merchandise from the workplace without paying for the items. Ms. Gorgy would wait until after normal business hours to do her personal shopping. Ms. Gorgy would then use a self-check lane to scan most, but not necessarily all, of the merchandise in her shopping cart to make it look like she was engaged in a normal self-check transaction. Ms. Gorgy would void almost all of the items from the transaction, but keep those same items in her possession. On September 29, Ms. Gorgy removed \$116.62 worth of merchandise from the workplace after paying only \$3.58. On October 12, Ms. Gorgy removed \$330.32 in merchandise from the workplace after paying only \$15.74. On October 13, Ms. Gorgy removed \$268.84 in merchandise from the workplace after paying only \$5.38. On October 19, Ms. Gorgy removed \$230.31 in merchandise from the workplace after paying only \$1.78. Ms. Gorgy returned a few minutes later and took another \$17.56 in merchandise after paying \$3.49. Because the thefts occurred after normal business hours, there was not a door

greeter present to check Ms. Gorgy's receipts as she exited the workplace with the stolen merchandise.

Ms. Gorgy's multiple thefts from the employer came to the employer's attention when a regional loss prevention officer alerted the Windsor Heights store management to the pattern of Ms. Gorgy voiding items in connection with personal purchases. The employer then reviewed video surveillance and associated receipts. The video surveillance record exposed each theft of merchandise, from Ms. Gorgy's shopping for items, through the irregular handling of the transaction at the self-check lane, through Ms. Gorgy leaving the store with the stolen items.

On October 29, 2019, a loss prevention officer interviewed Ms. Gorgy. At that time, Ms. Gorgy admitted the thefts. Ms. Gorgy told the employer that she was a struggling mother and had taken the items to feed her children. Ms. Gorgy had used an EBT card in connection with at least four of the five thefts. The employer summoned law enforcement to the workplace. Ms. Gorgy was arrested and discharged from the employment at that time.

Ms. Gorgy's first language is Arabic. Ms. Gorgy is able to communicate in English. Ms. Gorgy's thefts from the employer did not arise from a mistake or misunderstanding based on language issues.

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).

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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The weight of evidence in the record establishes that Ms. Gorgy was discharged on October 29, 2019 for misconduct in connection with the employment. The employer presented credible, detailed testimony regarding the employer's thorough investigation of the theft incidents. On the other hand, Ms. Gorgy provided testimony that was not credible. Ms. Gorgy's assertion that she could not remember any dates or details of any of the five theft incidents was convenient, but not credible. One of the thefts involved more than \$300.00 in merchandise. Two of the thefts involved more than \$200.00 in merchandise. These were not small, forgettable incidents. Ms. Gorgy's assertion that the theft incidents were "a mistake" based on a language barrier was not credible. The administrative law judge noted several times during the appeal hearing when Ms. Gorgy began to answer questions asked in English before the interpreter interpreted the questions into Arabic. Ms. Gorgy intentionally understates her English language skills. The evidence establishes a motive for theft, opportunity to commit the thefts, and that the thefts occurred as described by the employer. Each of the thefts demonstrated a willful and wanton disregard of the employer's interests and of Ms. Gorgy's duty to the employer. Each act constituted misconduct in connection with the employment. Ms. Gorgy is disqualified for

benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Gorgy must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

Iowa Code section 96.5(2)(b) and (c) provide:

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:

b. Provided further, if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

In the event Ms. Gorgy pleads guilty to, or is otherwise convicted of a serious misdemeanor or higher offense in connection based on the thefts from the employer, the employer may contact Iowa Workforce Development to allege gross misconduct pursuant to Iowa Code section 96.5(2)(b) and (c).

DECISION:

The December 13, 2019, reference 01, decision is affirmed. The claimant was discharged for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn