

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JENNIFER A RICHEY**  
Claimant

**APPEAL NO. 12A-UI-07517-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GIT-N-GO CONVENIENCE STORES INC**  
Employer

**OC: 05/27/12  
Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Jennifer Richey filed a timely appeal from the June 13, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 17, 2012. Ms. Richey participated and presented additional testimony through Nichole Moore and Chris Farr. Melissa Shinn represented the employer. Exhibits One, Two, A, and B 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: Jennifer Richey was employed by Git-N-Go Convenience Stores, Inc. from January 2012 until May 17, 2012, when Melissa Shinn, supervisor, suspended her from the employment. Ms. Shinn subsequently discharged Ms. Richey from the employment. Ms. Richey started the employment as a clerk and was soon promoted to assistant manager. Ms. Richey's immediate supervisor was Dennis Porter, store manager.

The suspension and discharge were based on the employer's belief that Ms. Richey had misappropriated \$500.00 from a bank deposit she was supposed to make on May 14, 2012. On that day, Ms. Richey prepared the May 14 bank deposit. Another employee had prepared the bank deposit for May 13. Ms. Richey was the only employee on duty from the time that she prepared the May 14 deposit and the time she took it to the bank and the only one with access to the safe on May 14. Ms. Richey took the May 13 and May 14 deposits to the bank. Ms. Richey had a friend, not a coworker, accompany her to the bank to make the deposit. There was no problem with the May 13 deposit prepared by the other employee. When the teller counted the May 14 deposit, the deposit was short \$500.00. The bank tellers recounted the May 14 deposit and it was still short. Ms. Richey signed paperwork at the bank to acknowledge that the deposit was short \$500.00. Ms. Richey took the deposit bags back to the workplace. Ms. Richey left for the day without alerting Mr. Porter or anyone else that the bank deposit was short \$500.00.

Ms. Richey was next scheduled to work on May 17. When Ms. Richey arrived for work that day, Mr. Porter notified her that she was suspended from the employment due to the missing \$500.00. Mr. Richey was acting upon the instructions of Melissa Shinn, supervisor. Ms. Richey telephoned Ms. Shinn to ask why she was suspended. Ms. Shinn told Ms. Richey that she was suspended due to the missing \$500.00 until the employer figured out where the money was. Ms. Shinn told Mr. Richey that Ms. Richey was responsible for the money and that the employer needed to have the money. Ms. Richey said she did not have the money. Ms. Richey asserted the money had been there when she had counted the deposit, but was missing when she got to the bank. Ms. Shinn asked Ms. Richey why she had not called anyone to report the missing deposit money and Ms. Richey responded that she did not know why.

After Ms. Richey was suspended, Ms. Shinn reviewed the employer's deposit records and contacted the bank to make sure the bank had not ended up with overage on May 14. After performing what investigation she could, Ms. Shinn contacted the Marshalltown Police Department to file a complaint. Ms. Richey was subsequently charged with theft. Ms. Richey had not yet been arraigned at the time of the appeal hearing. On June 8, Ms. Shinn documented a discharge from the employment, but did not contact Ms. Richey to have her sign the separation form.

#### **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. Richey was negligent in failing to notify the employer on May 14, 2012 that there was \$500.00 missing from the May 14 bank deposit. Ms. Richey was also negligent in having a friend accompany her to the bank when she took the deposit. The evidence establishes that *something* went wrong with the May 14 bank deposit. The evidence fails to establish that Ms. Richey stole the \$500.00 from the employer. The employer has presented no records relating to the missing \$500.00. There is no deposit slip, no bank record, no documentation to prove that the missing \$500.00 involved more than an accounting error or some other cash handling error. The employer has presented no testimony from other employees regarding the chain of events surrounding the missing \$500.00. The isolated incident of negligence would not constitute misconduct in connection with the employment.

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

In the event that Ms. Richey subsequently admits in writing to, or pleads guilty to, an indictable offense related to missing \$500.00, the employer may re-contact Workforce Development with proof of the same so that the agency may consider whether Ms. Richey engaged in gross misconduct. See Iowa Code section 96.5(2)(b) and (c).

Iowa Code section 96.5-2-b-c 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:

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.

**DECISION:**

The Agency representative's June 13, 2012, reference 01, decision is reversed. The claimant was suspended and 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/kjw