

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRANDIN T KRISINGER
Claimant

APPEAL NO. 11A-UI-09846-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**CASEY'S MARKETING COMPANY
CASEY'S GENERAL STORES**
Employer

OC: 06/05/11
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 24, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 18, 2011. Claimant Brandin Krisinger did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. David Case represented the employer and presented additional testimony through Rosie Sellers. Exhibits One through Four 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: Brandin Krisinger was employed by Casey's Marketing Company as a clerk/pizza maker from May 2010 until May 25, 2011, when Area Supervisor Rosie Sellers and Store Manager David Case discharged him for theft.

On May 25, 2011, Area Manager Rosie Sellers was conducting a void audit pursuant to the employer's standard operating procedures. In the course of performing the void audit, Ms. Sellers noted a questionable transaction handled by Mr. Krisinger. The transaction dated from May 4, 2011. Mr. Krisinger rang two pizzas and two lottery tickets into the register. Mr. Krisinger then voided the pizzas from the transaction. Mr. Krisinger then added \$20.00 "cash back" to the customer's transaction, but did not give the customer the cash. Indeed, Mr. Krisinger quickly closed the cash register drawer as soon as it automatically opened. The customer ended up paying full price for the pizzas, but the employer was shorted the retail value of the pizzas. The customer then left with the pizzas. Mr. Krisinger then threw away the order ticket for the pizzas. Mr. Krisinger's conduct was documented through the computer record of the transaction and surveillance video, both of which the employer reviewed on May 25, 2011.

The employer questioned Mr. Krisinger about the matter when he appeared for work on May 25, 2011. Mr. Krisinger asserted ignorance of the transaction. Mr. Krisinger then offered to pay the employer back the \$20.00. The employer then proceeded with discharging Mr. Krisinger from the employment.

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 Mr. Krisinger committed theft from the employer on May 4, 2011 when he manipulated a transaction so that a customer could be charged full price for pizzas, the employer could be shorted the revenue from the pizzas, and Mr. Krisinger could profit \$20.00 at the employer's expense. The conduct was misconduct in connection with the employment. The employer did not discover the conduct until May 25, 2011, but then investigated the matter and discharged Mr. Krisinger the same day. The May 4 theft discovered on May 25 constituted a "current act" for unemployment insurance purposes.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Krisinger was discharged for misconduct. Accordingly, Mr. Krisinger is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Krisinger.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's June 24, 2011, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs