

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FAITH BAILEY
Claimant

APPEAL NO. 06A-UI-09156-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KWIK SHOP INC
Employer

**OC: 08/13/06 R: 04
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

Kwik Shop filed a timely appeal from the September 9, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 26, 2006. Claimant Faith Bailey participated. Joan Carroll of Employer's Unity/TALX UC eXpress represented the employer and presented testimony through Davenport Store Manager Kai Brown. Exhibits One through Six were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her for benefits. She was not.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Faith Bailey was employed by Kwik Shop in Burlington until May 25, 2006, when Burlington Store Manager Tina White discharged her. The final incident that prompted the discharge occurred on May 23, 2006, when Ms. White concluded that Ms. Bailey was responsible for a \$50.00 shortage in lottery ticket proceeds and an additional \$1.71 cash shortage. The store where Ms. Bailey worked has been sold since her employment ended. Ms. White is no longer employed by Kwik Shop and did not testify at the hearing. Though Davenport Store Manager Kai Brown was employed at the Burlington store at the time of the incident, he did not work with Ms. Bailey, had no involvement in investigating or addressing the incident, and has no personal knowledge of the incident. In addition, Mr. Brown had no involvement in or personal knowledge concerning any prior reprimands issued to Ms. Bailey. Ms. Bailey learned of the May 23 shortage on May 25, at the time that Ms. White advised her that she was being discharged from the employment. The employer had a written policy concerning cash shortages that was contained in an employee handbook. Under the policy, cash shortages of \$25.00 or more could result in termination of employment. On November 10, 2005, Ms. Bailey acknowledged in writing her receipt of a copy of the handbook. Ms. Bailey does not know how the alleged shortage occurred, but recalls that the store was busy during her afternoon shift on May 23. At the time Ms. White advised Ms. Bailey that she was being discharged from the employment, Ms. White and Ms. Bailey speculated that the shortage might have related to a transaction

wherein a customer had purchased in excess of 100 instant play lottery tickets. Ms. White had previously concluded that Ms. Bailey was responsible for a \$30.00 cash shortage on March 3, 2006 a \$40.00 lottery ticket shortage on April 11 and an additional \$1.00 cash shortage on that date, and a \$20.00 cash shortage on April 12. Ms. Bailey had signed the reprimands as directed, but did not review or agree with assertions contained therein. Ms. Bailey subscribes to a religious faith that prohibits her from gambling and adamantly denies any misconduct in connection with any alleged lottery ticket shortage.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Bailey was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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).

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 fails to establish misconduct in connection with the employment that would disqualify Ms. Bailey for unemployment insurance benefits. The employer failed to present any testimony from persons with firsthand knowledge of the incident that prompted the discharge or any prior incidents. The employer's evidence regarding the final incident is limited to the "Conference with Employee Record" that Ms. White used to document the discharge. While that document indicates an allegation, it does not present sufficient evidence to warrant a conclusion that Ms. Bailey was negligent or careless in performing her duties or that she engaged in intentional misconduct on May 23, 2006. The evidence fails to establish that a shortage in fact occurred on May 23. If a shortage did in fact occur on May 23, the evidence fails to establish that Ms. Bailey was responsible for it.

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

DECISION:

The Agency representative's September 9, 2006, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs