

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHIRLEY J BULLOCK
Claimant

APPEAL NO. 15A-UI-10804-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 08/30/15
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 17, 2015, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged for no disqualifying reason. After due notice was issued, a hearing was held on October 12, 2015. Claimant Shirley Bullock did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Sabrina Bentler represented the employer and presented testimony through Charlie Pfiffner and Mike Blunk. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Two and Three into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of documenting the employer's participation in that proceeding.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid benefits.

Whether the claimant is required to repay benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Shirley Bullock was employed by Hy-Vee as a part-time bakery clerk from May 2015 until August 14, 2015, when Charlie Pfiffner, Assistant Manager for Perishables, discharged her from the employment for consuming food that belonged to the employer without paying for it. At the start of the employment, the employer reviewed with Ms. Bullock the employer's written Code of Conduct policy. The employer also provided Ms. Bullock with a copy of the employee handbook

that contained the policy. The Code of Conduct contained the following provision: "Purchase of merchandise requires a paid receipt to be with the purchaser or attached to the item prior to use or consumption." On August 14, 2015, Ms. Bullock was working in the bakery department when she took a donut from the display case, kneeled down out of sight of customers, and consumed the merchandise without first paying for it. Pete Cole, Bakery Manager, witnessed the conduct and reported the incident to Mr. Pfiffner. When Mr. Pfiffner spoke to Ms. Bullock about the conduct, Ms. Bullock asserted that it was her practice to eat a donut during her shift before she went on a cigarette break and to pay for any merchandise she consumed before she left at the end of her shift. Such conduct was contrary to the employer's Code of Conduct.

Ms. Bullock established a claim for benefits that was effective August 30, 2015. Ms. Bullock has received \$893.00 in benefits for the period of August 30, 2015 through October 3, 2015. Hy-Vee is not a base period employer for purposes of the claim and has not been charged for benefits paid to Ms. Bullock.

On September 16, 2015, a Workforce Development claims deputy held a fact-finding interview to address Ms. Bullock's separation from the employment. Mike Blunk, Human Resources Manager, represented Hy-Vee at the fact-finding interview.

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.

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). 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 misconduct in connection with the employment. Hy-Vee is in the business of selling food and other merchandise. Hy-Vee put Ms. Bullock on notice at the start of the employment that consuming food without first paying for it and without having a receipt with the food was prohibited. Despite receiving a copy of the written policy and despite participating in orientation that included review of the policy, Ms. Bullock elected to violate the policy on August 14, 2015. Though the conduct represented a small monetary loss to the employer, it was a loss nonetheless. Ms. Bullock took something that belonged to the employer and converted it to personal use. The conduct violated the standards of conduct that the employer reasonably expected Ms. Bullock to follow. Accordingly, Ms. Bullock is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account has not been charged for benefits paid to Ms. Bullock and will not be charged for benefits paid to Ms. Bullock.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. Iowa Code section 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$893.00 in benefits for the period of August 30, 2015 through October 3, 2015. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment.

DECISION:

The September 17, 2015, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The claimant was overpaid \$893.00 in benefits for the period of August 30, 2015 through October 3, 2015. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment. The employer is not a base period employer and has not been charged for benefits already paid to the claimant. The employer's account will be relieved of liability for future benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css