

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DIANA L BALLENTINE**  
Claimant

**APPEAL NO. 11A-UI-10448-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 07/03/11**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Diana Ballentine filed a timely appeal from the July 29, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 30, 2011. Ms. Ballentine participated. Judy Berry of Corporate Cost Control represented the employer and presented testimony through Brian Mertes, Manager of Store Operations.

**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: Diana Ballentine was employed by Hy-Vee as a part-time baker clerk from 2008 until July 3, 2011, when Brian Mertes, Manager of Store Operations, and Amy Day, Manager of Perishables, discharged her for theft. A month prior to the discharge other employees had alerted the store management that Ms. Ballentine might be taking items from the store without paying for them. On July 3, 2011, an employee alerted the employer to the fact that there was bagged merchandise located at the back of the bakery area. Mr. Mertes and Ms. Day monitored Ms. Ballentine's departure from the store at the end of her shift and intercepted her at her car. Ms. Ballentine had a bag of grocery items and two loaves of bread in her possession. Mr. Mertes and Ms. Day had Ms. Ballentine return to the store for a meeting. Ms. Ballentine asserted that she had paid for the items in the grocery sack, but could not say which lane she had used or which cashier had rung up the items. Ms. Ballentine could not produce a receipt. The employer's written policy required that Ms. Ballentine have a receipt with any merchandise she had in her possession for personal consumption. Mr. Mertes ran a computer search to see whether any of the items in Ms. Ballentine's possession had been sold to *any* customer that day. None of the items had been sold. Mr. Mertes also ran a computer search to locate a receipt that would correspond to the items and there was none. Ms. Ballentine had indeed placed all but the loaves of bread in a Hy-Vee bag and had removed the grocery bag and the loaves of bread from the store without paying for items. The employer's written policy indicated that unauthorized removal of store property could result in discharge 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).

Ms. Ballentine's testimony was almost entirely lacking in credibility and bore the hallmarks of a story one might fabricate after being caught shoplifting. These included not remembering which lane she went through, not being able to identify which cashier rang up her purchase, not being able to say when she made the purchase, conveniently losing her receipt, and pleading ignorance of the employer's written policies despite working for the employer for three years.

The evidence in the record establishes Ms. Ballentine shoplifted from her employer on July 3, 2011, was caught in the act, and was discharged for the theft.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Ballentine was discharged for misconduct. Accordingly, Ms. Ballentine 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 shall not be charged for benefits paid to Ms. Ballentine.

**DECISION:**

The Agency representative's July 29, 2011, reference 01, decision is affirmed. 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 employer's account shall not be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs