

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ALEJANDRO GALVEZ BARRAGAN**  
Claimant

**APPEAL NO. 11A-UI-10210-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

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

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

**STATEMENT OF THE CASE:**

Alexandro Galvez Barragan filed a timely appeal from the July 26, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 29, 2011. Mr. Galvez Barragan participated. Alice Rose Thatch of Corporate Cost Control represented the employer and presented testimony through Ric Anderson, Stephen Larson, and Tony Wong. Exhibits One through Eight and A 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: Alejandro Galvez Barragan was employed by the Marshalltown Hy-Vee as a full-time Chinese Express cook and clerk from 2004 until July 1, 2011, when Ric Anderson, store director, discharged him from the employment.

Toward the end of Mr. Galvez Barragan's employment, the Marshalltown Hy-Vee was participating in a fundraising promotion with a local football team whereby customers could purchase "Free Chinese Express Single Entrée Meal" tickets that could later be redeemed at the Hy-Vee Chinese Express to obtain a meal. The Chinese Express clerk was supposed to code the transaction in the register so that it accurately reflected use of one of the meal tickets. The Chinese Express clerk was then supposed to put an "X" on the meal ticket to indicate that it had been used. The Chinese Express staff were supposed to keep the used meal tickets together as part of each day's operations, so that they could be matched with the corresponding cash register transaction as part of an audit the following day. Two weeks prior to the discharge, the employer noted that the register in the Chinese Express was showing more than it should for use of the "Free Chinese Express Single Entrée Meal" tickets. The employer set up a surveillance camera in an attempt to uncover the source of the discrepancy.

On June 30, 2011, the surveillance equipment recorded Mr. Galvez Barragan giving his nephew a meal from the Chinese Express. Neither Mr. Galvez Barragan nor his nephew paid for the meal. After Mr. Galvez Barragan gave his nephew a free meal, he rang up that meal as if it had been obtained by means of one of the free meal tickets. Mr. Galvez Barragan's nephew had not presented a free meal ticket to obtain the meal. Mr. Galvez Barragan was not authorized to convert the free meal tickets to his personal use and did not in fact use one of these actual tickets to obtain the meal for his nephew. Mr. Galvez Barragan knew that the employer's rules prohibited him from ringing up his own purchases or purchases made by a family member.

On July 1, Store Director Ric Anderson, Manager of Perishables Stephen Larson, and Chinese Kitchen Manager Tony Wong met with Mr. Galvez Barragan. Mr. Galvez Barragan initially asserted that his nephew had paid for the meal. After the employer shared the video surveillance with Mr. Galvez Barragan, Mr. Galvez Barragan said he had made a mistake, but did not specify what his mistake had been. Mr. Galvez Barragan asserted to the employer that Mr. Wong had given him some free meal tickets as a bonus for working long hours. This was not true. While speaking with Mr. Galvez Barragan, Mr. Anderson referenced multiple prior instances in which Mr. Galvez Barragan had been counseled or reprimanded for violating the employer's food purchase policies. The employer ended the meeting by discharging Mr. Galvez Barragan from the employment.

The June 30 incident followed an incident from late 2007 wherein Mr. Galvez rang up his own food order in violation of the employer's work rules, gave himself a portion of food much greater than the standard in violation of the work rules, and then lied to the employer about having had another employee ring up the sale. Mr. Anderson warned Mr. Galvez Barragan that similar future conduct, including similar dishonesty, would result in his discharge from the employment.

The June 30 incident also followed incidents in July 2009 and July 2010 wherein Mr. Galvez Barragan substantially undercharged a coworker for food in violation of the employer's established work rules. At the time of the 2010 incident, Manager of Perishables Stephen Larson warned Mr. Galvez Barragan that he could face discharge if the conduct was repeated.

The written work rules were provided to Mr. Galvez Barragan at the start of his employment. Mr. Galvez Barragan was able to read, understand, and follow the work rules and reprimands based on his acquired English skills. Though Mr. Galvez is a non-native English speaker, Mr. Galvez routinely communicated with Hy-Vee customers and staff in English during his 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 weight of the evidence establishes multiple instances of theft and dishonesty during the employment, culminating with the June 30, 2011 theft and associated dishonesty that triggered the discharge. Mr. Galvez Barragan knowingly violated the employer's work rules on June 30, when he gave away food to his nephew. Mr. Galvez Barragan denied the employer the revenue due from the transaction. Mr. Galvez Barragan rang up the transaction when he knew he was not allowed to. Mr. Galvez Barragan attempted to deceive the employer into believing that his nephew had paid for the meal, that the meal had gone out as part of the football promotion, and that his supervisor had authorized the conduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Galvez Barragan was discharged for misconduct. Accordingly, Mr. Galvez Barragan 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. Galvez Barragan.

**DECISION:**

The Agency representative's July 26, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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