

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DOUGLAS J LEHR
Claimant

APPEAL NO. 14A-UI-04023-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 03/23/14
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Douglas Lehr filed a timely appeal from the April 17, 2014, reference 01, decision that disqualified him for benefits. After due notice was issued, a hearing was held on May 6, 2014. Mr. Lehr participated. Ajah Anderson of Corporate Cost Control represented the employer and presented testimony through Jeff Bortell. Exhibits One through Five 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: Douglas Lehr was employed by Hy-Vee as a convenience store clerk from May 2013 until November 27, 2013, when Jeff Bortell, Store Director, discharged him from the employment for unauthorized removal of store property in violation of the employer's written policy. The incidents that triggered the discharge occurred on November 24, 2013. On that day, Mr. Lehr consumed a donut from a display case without first paying for the item. The employer reviewed the transaction record for the day in question, which reflected that Mr. Lehr had not purchased the donut. The employer had a written policy that prohibited employees from consuming food without first paying for it. The policy required that employees keep a receipt for the purchase with them. Also on November 24, Mr. Lehr removed five sandwiches from a display case and gave them to a customer for free without authorization. Mr. Lehr gave the sandwiches away at 4:30 p.m. The company's policy was to discard the sandwiches after 10:00 p.m. The company had a written policy that prohibited employees from giving away merchandise for free. The employer had provided Ms. Lehr with a copy of the company policies at the time of hire. Though there were additional issues in the employment that the employer discussed with Ms. Lehr on November 25, it was the two issues referenced above that factored in the discharge decision.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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 that Mr. Lehr knowingly violated two company policies concerning unauthorized removal of merchandise. Mr. Lehr helped himself to a donut without paying for it. Mr. Lehr gave away several sandwiches without authorization to do so. Mr. Lehr held the employer's merchandise in trust for the sole purpose of assisting in generating revenue for the employer based on sale of the merchandise. Mr. Lehr's actions in converting the employer's inventory to his own use or to a customer's use, without compensation to the employer, was in willful violation of the employer's interests and constituted misconduct in connection with the employment. Mr. Lehr 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.

DECISION:

The claims deputy's April 17, 2014, reference 01, decision is affirmed. 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 for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs