

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**GREGORY S BERGMAN**  
Claimant

**APPEAL NO. 14A-UI-07137-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TARGET CORPORATION**  
Employer

**OC: 06/15/14**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Gregory Bergman filed a timely appeal from the July 1, 2014, reference 01, decision that disqualified him for benefits. After due notice was issued, a hearing was held on August 4, 2014. Mr. Bergman participated. Paul Leonardson represented the employer.

**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: Gregory Bergman was employed by Target Corporation as a full-time utility attendant from 2003 until June 13, 2014, when the employer discharged him for cutting the lock off an empty locker. Mr. Bergman's immediate supervisor was Paul Leonardson, Engineering and Facilities Department Supervisor. Mr. Bergman's work hours were 6:00 a.m. to 4:00 p.m. The employer had placed the lockers in the work area used by the utility attendants so that the utility attendants could use the lockers. The utility attendants on another shift had modified their lockers by adding a shelf. The employer had locked a particular bank of empty lockers to prevent the utility attendants from using that particular bank of lockers. Supervisor Will Thomsen had the keys to locks. Mr. Thomsen had told utility attendant Thomas Dice that the utility attendants could not use the locked bank of lockers. Mr. Bergman was not part of that conversation. Mr. Dice, Mr. Bergman, and another dayshift utility attendant desired access to the locked bank of lockers to get a shelf therein that they hoped to use to modify their lockers in a manner similar to what the other shift had done. Rather than check with a supervisor to get permission to access the locked empty lockers, or to get a key to open the locked empty lockers, Mr. Bergman used bolt cutters to cut a lock off an empty locker. In doing so, Mr. Bergman relied upon Mr. Dice's representation that the key to the lock was not available. The employer deemed the conduct intentional destruction of the employer's property and discharged Mr. Bergman from the employment.

In the course of performing his regular duties, Mr. Bergman was sometimes called upon, by a supervisor or by an employee who could not gain access to his or her locker, to cut the lock off the locker. Mr. Bergman did not view his decision to cut the lock off an empty locker on June 12 as significantly different from those situations when a supervisor or another employee had asked him to cut off a lock.

### **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 that Mr. Bergman cut a lock off an empty locker in an effort to modify a locker that the employer had recently made available to him. Mr. Bergman’s decision to modify his locker was based on his observation of other lockers that had been similarly modified. Mr. Bergman’s decision to cut the lock was based on a coworker’s representation that the key was not available. Mr. Bergman’s decision to cut the lock was based on prior experience with cutting locks at the employer’s request or at the request of a coworker. Mr. Bergman was not aware of the explicit prohibition the employer provided to Mr. Dice regarding use of the locker. Mr. Bergman was negligent in failing to contact a supervisor for permission to access the locker or for permission to cut the lock off the locker. Mr. Bergman did not vandalize the locker. He did, however, destroy the lock. The evidence does not establish that Mr. Bergman’s conduct was motivated by a willful or wanton disregard of the employer’s interests or by an intentional disregard of the employer’s policy. In the absence of such willful and wanton disregard, the administrative law judge concludes that Mr. Bergman was discharged for no disqualifying reason. The evidence indicates that Mr. Bergman had a lesser degree of culpability in the matter than Mr. Dice. Mr. Bergman is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged for benefits.

**DECISION:**

The claims deputy’s July 1, 2014, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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