

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ANNA LLOYD
Claimant

CASEY'S MARKETING COMPANY
Employer

APPEAL 21A-UI-11530-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 03/21/21
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed an appeal from the April 7, 2021, (reference 01) unemployment insurance decision that granted benefits based upon the finding she was discharged, but misconduct was not the reason for that discharge. The parties were properly notified of the hearing. A telephone hearing was held on July 26, 2021. The claimant participated and testified. The employer participated through Manager Jacklyn Hodge.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant, Anna Lloyd, worked as a store team member for the employer, Casey's Marketing Company, from January 6, 2006 until May 27, 2020, when she was discharged. As a team store member, the claimant ran the register and prepared various food items in a gas station.

The employer has an employee handbook which describes its policies. The claimant received a copy of the employee handbook at the time of her hire. One policy, company policy 34.500 states "employees are expected to conduct themselves and behave in a manner that leads to efficient and effective operation of the company."

The claimant is more expressive in her communication than the general population. She uses gestures when she talks to someone in person.

On May 18, 2020, the claimant encountered the frequent customer, Mike, with whom; she had developed an acquaintance with over her term of employment. As that relationship developed, the two teased each other in a playful way. On that day, Mike told the claimant the wrong pump

to place a pre-pay of \$40.00 in error. The claimant did not immediately realize the error and another customer, Bill, starting pumping gas in his vehicle from that pump. The claimant called to Bill to stop pumping the gas because it was Mike's money. The claimant had to call an associate, Tommy Lee, to help her remove charges from Mike's card. As this stressful situation developed, a line of 11 people formed to watch the spectacle. In frustration and in a playful way, the claimant uttered, "I'm going to kill you when this is all over. I have told you a thousand times." The claimant's tone was not such that this could be taken as a threat. Nevertheless, Mike was humiliated because there were so many onlookers.

On May 19, 2020, Mike's wife spoke with Ms. Hodge about what had occurred the previous day. Ms. Hodge reported during the hearing that conducted an investigation of the incident over the following days by speaking with Mr. Lee and another customer. Ms. Hodge could not identify this customer at the time of the hearing. Ms. Hodge reviewed video of that incident as well. The recorded video did show the claimant making her typical expressive hand gestures, but it did not have audio, so Ms. Hodge could not hear the tone of the claimant's voice. Ms. Hodge's impression from this investigation was that the claimant's speech was humiliating to Mike by viewing Mike's body language on the video. The witnesses also said the claimant repeated the statement three times. After conducting this investigation, Ms. Hodge consulted with Regional Supervisor Sue Guillion and District Supervisor Tessa Keller. They all agreed that the claimant should be terminated because it violated the employer's policies.

During the hearing, Ms. Hodge explained that she did not register the witnesses she spoke to during the investigation because she was not aware that it was necessary to provide that testimony.

On May 27, 2020, Ms. Hodge and Ms. Keller met with the claimant and terminated her. The claimant refused to sign her termination notice because she this statement was no different from many other off color statements she had made over the course of her employment. The termination notice paraphrases company policy 34.500 and adds "Treating others in a discourteous manner is not acceptable." The termination notice requests that an employee's signature merely as an acknowledgement of receipt and clarifies it is not an admission of guilt. There is nothing in the record to support the notion the employer had disciplined her for times when she joked in a similar manner in the past. For example, the claimant told a customer to take their shoes off because they would ruin the floor. The claimant did not receive formal discipline for this behavior that suggested another occurrence would result in termination.

The following section describes facts relevant to the issue of overpayment and employer participation:

The administrative record KFFD shows the employer was mailed a notice of fact finding on May 12, 2020 for a fact finding interview on May 19, 2020. During the hearing, Ms. Hodge testified she believed the notice of fact finding was mailed to the corporate office, and added she did not participate in fact finding. KFFD shows the employer contact as Samantha Lewis. Ms. Hodge is not familiar with Ms. Lewis or the employer contact number listed on KFFD.

The claimant made a claim for benefits effective on March 22, 2020. The claimant exhausted her remaining \$2,561.00 regular unemployment benefits over the next 14 weeks with 13 full weekly benefit payments being paid from weeks ending June 6, 2020 – September 5, 2020 and a partial payment of 62.31 on September 12, 2020.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to non-disqualifying conduct. Since the claimant is eligible for benefits, the overpayment issue is moot.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not

misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

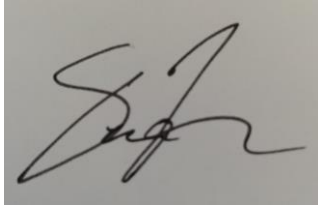
The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events.

In particular, the administrative law judge finds the claimant uttered the statements, "'I'm going to kill you when this is all over. I have told you a thousand times,'" in a playful manner to blow off the stress of the moment. The employer does not contend this was a threat, but merely that the customer was humiliated by the exchange. That may be true, but the exchange would have likely been humiliating for the customer regardless of what the claimant said because his error was holding up a long line of customers. Given that the statement was not a threat or even one uttered in an angry manner, the administrative law judge does not find this isolated statement disqualifying misconduct. The administrative law judge is not condoning the claimant's behavior, but he does not believe the claimant was on notice that playful remarks to a customer such as this would lead to termination if repeated. Benefits are granted, provided she is otherwise eligible.

DECISION:

The April 7, 2021, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment non-disqualifying conduct. The overpayment is moot because the claimant is eligible for benefits. Benefits are granted, provided she is otherwise eligible.

A handwritten signature in black ink, appearing to read 'Sean M. Nelson', is written over a light gray rectangular background.

Sean M. Nelson
Administrative Law Judge
Unemployment Insurance Appeals Bureau
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Des Moines, Iowa 50319-0209
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August 4, 2021
Decision Dated and Mailed

smn/mh