

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JULIE M LYNCH
Claimant

THE VGM GROUP INC
Employer

APPEAL 18A-UI-05764-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/25/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 18, 2018, (reference 01) unemployment insurance decision that denied benefits based on her discharge for dishonesty in connection with her work. The parties were properly notified of the hearing. A telephone hearing was held on June 12, 2018. The claimant participated and testified. The employer participated through Human Resource Director Nancy Demro and Payroll Manager Kaara Latusick. Employer's Exhibits 1 through 4 were received into evidence.

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: Claimant was employed full time as an outbound patient coordinator from May 27, 2014, until this employment ended on March 29, 2018, when she was discharged.

On March 9, 2018, an automatic deposit of \$10,883.00 was generated to claimant's bank account by the employer. The transaction was the result of an accounting error. Claimant did not notice the transaction until approximately one week later and promptly used the funds to pay off her car and some other debt. Claimant explained she knew the company was having a good year and assumed the payment was a bonus. Employees had regularly been getting a \$300.00 annual bonus around Christmas time and had received an additional \$200.00 bonus several years prior when the company had a good year. Claimant did not point out the large deposit to anyone in the accounting department or with the employer.

On March 23, 2018, the accounting error was discovered by Latusick. Latusick immediately contacted claimant, explained there had been an error, and asked if she could write a check returning the funds to the employer that day. Claimant told Latusick she could not immediately repay the funds because she had already spent the money. Latusick explained to claimant that, because she was not entitled to the money, they would need to make arrangements for her to pay it back. Latusick suggested the possibility of a wage garnishment, explaining to claimant that the maximum amount they would be able to withhold from each paycheck would be around \$235.00, or twenty-five percent of her gross wages. Claimant said she could not afford to have

the employer do that. Latusick then suggested claimant try to get a loan and make a lump sum payment. Claimant agreed to look into that option.

The following day, Saturday, March 24, claimant went to the bank to see about getting a loan. Claimant decided against this option, as she would be required to have someone cosign and the interest rate would be very high. Claimant informed Latusick on Monday morning that a loan would not be an option. Claimant then sent an email to Demro requesting a meeting to discuss the situation. During the meeting Demro acknowledged the initial error was attributable to the accounting error, but noted claimant should have asked someone about such a large deposit before spending the money. Demro also emphasized that claimant would need to find a way to pay the money back. Demro agreed to give claimant time to consider her options, but stated the two would need to touch base again at the end of the week.

On Wednesday, March 28, Demro spoke with the company's Chief Financial Officer (CFO). He advised Demro to ask claimant what her car payment had been, as she had indicated the funds were used to pay off that loan, and the amount of the car payment should be manageable for claimant to have garnished from her wages. Demro followed up with claimant, who told her the monthly car payment was \$275.00. Claimant testified she then offered to have that amount garnished from her wages. Demro did not recall this offer, but testified she again went through various repayment options with claimant. According to Demro, the only suggestion claimant made was for Latusick to take responsibility for repaying half the funds, since it was her accounting error that initially put the funds in claimant's bank account. Demro did not see this as a reasonable alternative.

On Thursday, March 29, Demro followed up with the CFO regarding her conversation with the claimant. The CFO noted he was concerned that claimant was refusing to take any responsibility for her role in the situation or offer viable options for repayment. Demro agreed with his concerns. The decision was then made to discharge claimant from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.*

There is a dispute between the parties as to whether claimant agreed to have her wages garnished in order to repay the funds she was accidentally given. The claimant acknowledged she initially told Latusick that a \$235.00 garnishment would be too much. It does not follow that she would later suggest a higher \$275.00 garnishment. Furthermore, if claimant did agree to have her checks garnished, as she alleges, it would be illogical for the employer to then discharge her from employment, as an agreed garnishment of her wages would ensure repayment. 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 employer's version of events to be more credible than the claimant's recollection of those events.

The employer accidentally deposited \$10,883.00 into the claimant's bank account. The employer acknowledged this error, but explained to the claimant it would need the money back. The employer's expectation that claimant would return these funds was reasonable. The employer offered claimant multiple options for how she could repay the money, including a wage garnishment. Claimant refused all of these options and instead suggested her and Latusick split the cost of paying the money back. Despite the fact that the accounting error was attributable to Latusick, this was not a reasonable option. The claimant's refusal to voluntarily return the money to the employer or work out a repayment plan shows a deliberate disregard for the employer's interest. This is disqualifying misconduct. As such, benefits are denied.

DECISION:

The May 18, 2018, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs