

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA STANLEY
Claimant

APPEAL NO: 10A-UI-02122-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

PANDA EXPRESS INC
Employer

OC: 01-10-10
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 2, 2010, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 24, 2010. The claimant participated in the hearing. Mei Fung Chai, Multi-Unit Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as full-time general manager for Panda Express from June 28, 2008 to January 2, 2010. On November 27, 2009, the claimant's safe was short \$974.00 and she did not notify the employer. She then made every deposit after that date one day late so the employer would not be contacted by the corporate office and told the deposit was late because it appeared after she missed one that the rest were on time. On January 1, 2009, the claimant called the employer and told her the store was missing the December 29 and 30, 2009, deposits in the amount of nearly \$3,000.00. The employer went to the store but they could not find the missing money. The claimant also admitted the \$974.00 shortage November 27, 2009. The employer told her it had to terminate her employment for serious cash handling problems and while it did not believe the claimant stole the money, she was held responsible as the general manager. The police were called and on January 4, 2010, the employer asked the claimant to write a statement. The claimant wrote that "because there was a mistake in not counting the safe on November 27, 2009, I felt my job would be in jeopardy so I made the unethical decision to put the \$974.00 back out of my pocket after the holiday season and not bring this to anyone's attention. To do so I began to make deposits one day late." She never repaid the money. There was one occasion prior to November 27, 2009, where the employer checked the safe and there was a cash shortage. The employer trusted the claimant and wanted to give her a second chance so it did not issue a written warning to her at that time but told her cash handling

problems were “non-negotiable” and would result in termination of employment if it happened again in the future. The employer decided to terminate the claimant’s employment January 2, 2010, because she was dishonest in not telling the employer about the \$974.00 shortage November 27, 2009, and consequently between that and the nearly \$3,000.00 shortage from December 29 and 30, 2009, combined with the claimant’s decision to make all the deposits a day late, the employer felt there were trust and integrity issues involving the claimant.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant failed to tell the employer about the \$974.00 cash shortage November 27, 2009, made all the deposits following that a day late to cover that shortage and then had cash shortages totaling nearly \$3,000.00 for December 29 and 30, 2009. Because the claimant was dishonest in not telling the employer about the November 27, 2009, situation and then made the deposits a day late after that to cover it up, the

administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. Consequently, the employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits must be denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The February 2, 2010, reference 01, decision is reversed. 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. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs